

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 10,685

BRIEF FOR APPELLANTS AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLONIAL INVESTMENT COMPANY, ET AL, APPELLANTS,

v.

VICTOR R. TAYLOR, ET AL., *Appellees.*

Appeal from the United States District Court
United States Court of Appeals
For the
District of Columbia Circuit

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No. 10,685

**APPELLANTS' STATEMENT OF QUESTIONS
PRESENTED**

The question is whether in an action to rescind a contract for the sale of real estate, the representations of defendants' agent properly form a basis for rescission; whether the plaintiffs are barred by laches; whether the remedy is rescission or damages for breach of contract; whether there is an implied or express warranty in the circumstances of this case in the sale of a house, and, whether the court properly admitted evidence of soil tests to determine suitability for the construction of a septic tank, where such tests are made after consummation of the contract of sale.

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The jurisdiction of this court to entertain this appeal is found in the Act of June 5, 1948, Chap. 646, 62 Stat. 929, 28 U. S. C. A. sec. 1291.

STATEMENT OF THE CASE

Appellees, as plaintiffs, brought suit against the defendants jointly for rescission of a contract of the sale of a dwelling. Plaintiffs generally allege that there were misrepresentations by the defendants that the dwelling would be fit for human occupancy, and that they war-

ranted that the dwelling would be completed in a workmanlike and first class manner. Mainly, the charge was that the defendants had installed a septic tank system although they knew that the soil upon which the dwelling was constructed lacked sufficient percolation qualities for the proper functioning of such a system (JA 2-6). Trial was by the court without a jury, at the conclusion of which the court made findings of fact and conclusions of law (JA 11-18) and thereupon decreed that the plaintiffs were entitled to recover the sum of \$6,161.37, upon the payment of which they were required to reconvey the real estate to the defendants (JA 19). From this judgment the defendants appealed (JA 19-20).

The negotiations leading up to the sale as represented by the contract (JA 193-198) are not in dispute. Both plaintiffs dealt with the salesman of the defendant (JA 15, 113). They were at once advised that a septic tank serviced the property (JA 22). Both were advised that the tank would have to be cleaned out from every three to five years (JA 22, 115). No representation was made as to the condition of the soil, respecting its porosity (JA 68). It was represented that the house would be completed in a first class condition (JA 114). One of the plaintiffs characterized the conversation of the salesman as "the usual sales talk, a lot of it, of course, puffing" (JA 21). This in substance was the only testimony respecting the negotiations leading to the contract of sale.

It is also without dispute that when the plaintiffs moved into the house on March 27, 1948, (JA 25) they immediately experienced trouble with the septic tank (JA 25) and that defendants thereafter made effort to remedy the situation (JA 26, 27). Efforts to remedy the situation continued to November, 1948, (JA 29). January 6, 1949, the plaintiffs received notice from the defendants which indicated that no further action would be

taken to remedy the situation (JA 65, 66). Suit was filed March 10, 1949 (JA 2).

Over the objections of the defendants, a representative of the Virginia State Health Department was permitted to testify that he had made soil tests on October 27, 1948 (JA 37, 40). The witness was permitted to state the results of these tests (JA 41-49). There is also testimony of witnesses who had purchased homes in the same subdivision at the same time and who had made complaints to the defendants of improper functioning of sewage disposal facilities (JA 34, 80, 103 and 111).

Other soil tests were made on October 24, 1949 (JA 99) but there is no evidence that the defendants were advised of the results of the soil tests made prior to the construction of the dwellings.

There was evidence that the County Health Officer had advised the defendants that septic tank sewage disposal systems could be installed if they met with county requirements (JA 138) and that the defendants were permitted by county authorities to install a septic tank at the premises of the plaintiff prior to the construction of the dwelling (JA 139). It was further shown that the sanitation officer of the county issued a permit on July 25, 1947 (JA 180) had made an inspection of the ground before the permit was issued but was never requested to make a percolation test or test of the soil, that not being the policy of the health department (JA 181). It was also shown that about 400 houses in that vicinity had been served by septic tanks and that since January, 1944, some complaints had been received from other subdivisions (JA 182).

There was also evidence that during the year 1948, according to the official records of the United States Weather Bureau, the rainfall had been greater than at any year since 1889 (JA 130).

It was agreed by the expert witnesses that rain would have some effect upon the functioning of the septic tank (JA 59, 60) since it prevents the water in the purification field from being absorbed into the earth, if the water tables are too high (JA 41). It was also agreed that a septic tank is not to be preferred over a sewer (JA 189) and that such tanks are never installed where sewers are available (JA 101, 102).

The sanitation officer of the county had advised the defendants that there had been some trouble with septic tanks in the area and also that the condition of the soil required that the minimum area for a lot be increased from 10,000 to 15,000 sq. feet (JA 192,193). This practice was followed in this case. (JA 192).

The court found, first that the agent of the defendant had made an untrue statement that no other dwellings in the area were having trouble with their septic tanks (JA 11), although the evidence indicates that the salesman had not mentioned any trouble in the area (JA 68). The court also found that the plaintiffs had experienced trouble with the septic tanks and had made various attempts to induce the defendants to correct the situation until on January 5, 1949 the defendants indicated they would no longer do anything. The court found that this was first notice to the plaintiffs that the defendants did not intend to correct the defective system (JA 12), that the county health department requested the state health department to investigate the system, that investigations had been made on October 27, 28, 1948, the result of which disclosed the condition of the soil and its unsuitability for septic tanks (JA 12); that prior to construction the defendants had been advised by the sanitation officer of the county that the soil was tight and unsuitable for septic tank construction (JA 12), that complaints had been received by the defendants prior to the contract of sale of difficulties and that this information was withheld from the plaintiffs (JA 12, 13); that the building was not com-

pleted suitably and workmanlike (JA 13) and that agents of the defendants had made statements which were untrue and concerned material facts, were known by the defendants to be untrue and were made to induce the plaintiffs to purchase the property, plaintiffs relying upon them (JA 13), and found that the plaintiffs were entitled to a refund of \$7,988.75 to cover the maintenance, repair and improvements as well as the payments made by the plaintiffs to the defendants plus interest and less the fair and reasonable use of the property during the period involved in the amount of \$115.00 per month (JA 14).

STATEMENT OF POINTS ON APPEAL

1. The court improperly found the defendants' statements to be misrepresentations of a present material fact.

2. The remedy of the plaintiffs was not rescission, notwithstanding they may be entitled to damages for breach of a contract to remedy the condition.

3. The plaintiffs are barred by their laches.

4. There is no basis for an implied or an express warranty in the sale of the house.

5. The court erred in permitting evidence of soil tests made following the sale.

6. The defendants were not in default having fully met the requirements of the health authorities in construction of the dwellings.

SUMMARY OF THE ARGUMENT

1. The alleged representations of the agent of the defendant were expressions of an opinion and not statements of material fact; they were not statements of a present fact.

2. The plaintiffs have sought and obtained rescission. They did not act promptly to announce their purpose to rescind upon discovery of what they now allege to be a misrepresentation; such delay has changed the position of the defendants; it is impossible to restore the status quo, and the defendants cannot be restored to the same position, an essential element in granting relief by way of rescission.

3. The plaintiffs were not entitled to relief by reason of an express or implied warranty, not only because there was no evidence of either, but a breach of warranty does not entitle the plaintiffs to the type of relief they received.

4. It was error to permit the witnesses to testify as to the soil test made after the contract was delivered, in the absence of a showing that the defendants were advised of the result of such test if made prior to the commencement of construction.

5. The defendants having fully met the requirements of the county health and building authorities, cannot now be charged with dereliction.

ARGUMENT

1. **A Representation, to Entitle One to Rescind a Contract, Must be of a Material Fact; a Mere Expression of Opinion, or So-Called "Puffing" is Insufficient.**

Since a person is said to rely upon the representations, these must, necessarily, precede the signing of the contract, for it is said that he is induced to enter into the agreement upon the faith of such representations. Therefore, it becomes necessary to consider the testimony leading up to the signing of the contract of March 7, 1948.

Having been taken to the site by the salesman Lewis (JA 20) the plaintiff, Victor R. Taylor, in response to a

general question testified in respect of the septic tank (JA 21-22):

"... The salesman gave us the usual sales talk, a lot of it, of course, puffing.

* * * *

"... I asked him about the sewage, what happened to it. He said a septic tank.

"I said, 'Does it work?'

"He said, 'Yes, they have been in use for years and years.'

"I said, 'Do you ever have any trouble with them? I'd like to know that.'

"He said, 'Well, you have to have them cleaned out once every three to five years.' I let it go at that."

And, on (JA 68), the following appears:

"Question: Mr. Taylor, what if anything did Mr. Lewis tell you about the composition of the soil as it pertains to septic tank functioning?

"Answer: He didn't say anything about the soil, he just said the system would work, and it would go from three to five years with no trouble. If I had known anything else I certainly wouldn't have purchased the place."

"Question: Did Mr. Lewis say anything to you about any trouble that the area was having with septic tank systems?

"Answer: Definitely not. Had he done that, I certainly wouldn't have signed the contract. That is perfectly obvious."

And on Page JA 73):

"Question: And the salesman, Mr. Lewis, that spoke to you, didn't tell you anything about the septic tank except to say that it would work, and would have to be cleaned out every three years?

"Answer: Three to five years, he said there would be no difficulty."

The testimony of the co-plaintiff, Dorothy R. Taylor appears on pages (JA 114-115):

"Question: Did you ask Mr. Taylor (sic) specifically about the sewage or water disposal systems of this house?

"Answer: Yes, . . . I just naturally asked if it was all right.

* * * *

"Question: Mrs. Taylor, coming back to this specific date, March 5th, what if anything did you ask Mr. Lewis about the sewage and water disposal systems on the premises you were about to purchase?

"Answer: I asked them if they worked all right, because I remembered it is something that you should just have done right.

"Question: What did he say?

"Answer: He said, 'Oh, yes, don't have any trouble with it; they, all of them out here have them, all through this area, they are all septic tank systems; never have any trouble; maybe once in three to five years you might have to have it cleaned, but you will never have any trouble with it.'

This constitutes all the testimony in respect of the alleged representations made by the defendants prior to the signing of the contract. From this testimony the court was required to spell out a misrepresentation of a material fact in order to entitle the plaintiffs to relief by way of rescission. But the statement is merely the expression of an opinion and at most the puffing of a salesman. Moreover, it is readily seen that these statements concern the future and are for that reason deemed matters of opinion. The general rule is stated in the notes to 35 LRA 417, as follows:

The general rule is that a mere expression of opinion is not fraud. And certain kinds of expressions have come to be regarded as opinions, although they are not uttered in that form. Such are all puffing and trade talks, and statements of value, quality, title, credit, and the like. The reason most fre-

quently given for the rule is that the opposite party has no right to rely on it, and that therefore he cannot be misled by it, and so one of the necessary elements of fraud is wanting. Another reason is that there is no adequate means of proving that the opinion as expressed was not truly entertained, and it could scarcely be said to be fraudulent if it was an honest opinion.

That the plaintiff, Victor R. Taylor, did not rely on the statement of the salesman, is self evident, for he himself characterized the salesman's talk as "puffing". In the same note quoted from the LRA reporter, on page 420, it is said to be the general rule that statements regarding the future are deemed matters of opinion. The statements of Lewis the salesman, refer altogether to the future for he states the system will work and there will be no trouble. Of course, in any event, Lewis was not supposed to know that in the year 1948 there would be an unprecedented rainfall or that the system might be put to excessive use. There is nothing in his statements indicating anything but an opinion.

In *Kellam v. Frischkorn*, 219 NW 658, 242 Mich. 572, it was held that the representation must be of an existing fact and not refer to a future intended conduct of the defendant, unless made with fraudulent intent. On page 575, of the State Reporter, the court says:

Such misrepresentations (here a promise to resell the land and discount the sales contracts) could not be made a basis of recovery except it was proven that the defendant's agent made the same with an actual fraudulent intent . . . Even if we indulge in the assumption that the defendant's representative made the alleged representations, the record is absolutely barren of any proof which would justify a court in determining that at the time of such alleged misrepresentations they were prompted by a then present intent to deceive and defraud the plaintiff.

The following District of Columbia cases relate to misrepresentations of present existing material facts. *Shappirio v. Goldberg*, 20 App. DC 185, 192 US 232, related to the quantity of land sold; *Turner v. Brewer*, 54 App. DC 363, involved the sale of a house built on filled ground, the representation being that it rested on natural ground; in *Goldsten v. Burka*, 43 At Rep. (2d) 172, the seller represented that the house was served by a sewer when in fact it was a septic tank. The alleged representations in this case fall far short of being representations of existing facts.

2. **It is the Duty of One Seeking Rescission of a Contract Induced by Fraudulent Representations, to Act Immediately Upon Discovery of the Facts; He Must Announce His Purpose and Adhere to It, Otherwise the Objection is Deemed Waived.**

To obtain rescission of a contract for the purchase of real estate, the complaining party must, on discovery of the facts, at once announce his intention to rescind and adhere to it; otherwise, he will be held to waive the objection. *Shappirio v. Goldberg*, supra. The basis of the rule is founded in reason and justice. The defendant must be placed in status quo. Where real estate is sold subject to encumbrances, delay in rescinding often imposes upon the defendant loss occasioned by the payment of continual accruing interest for which he cannot be compensated. Then there is the possibility of a depressed market price of the real estate which may cause loss to the seller if he is required to take it back. Prompt action on the part of the complaining party may and often does reduce or avoid such loss. But the plaintiff's long delay has placed it beyond the court to restore the status quo.

In *McNair v. Sockriter*, 201 NW 102, 199 Ia. 1176, it was held that the depreciation of the property during the delay in seeking relief may be consideration in granting

the right to rescind. In *Pesciarelli v. Trestain*, 284 NW 656, 288 Mich. 89, it was held that if the delay works a disadvantage and the parties cannot be placed in status quo, relief will be denied. Here the court took judicial notice that property values had dropped. The court said the plaintiff should have acted promptly and "should have given defendant the opportunity to minimize its loss by re-sale."

Now, applying this rule of the law to the facts in this case, we do not find the plaintiffs adhering to the rule of prompt action. The contract was signed March 5, 1948. According to the testimony of the plaintiffs they moved into the house on March 27, 1948 (JA 25). They immediately noticed the toilet would not flush. The defendants came out the following Monday and attached the pump to the septic tank (JA 25). A pump was installed and a well dug, a so-called dry well (JA 26). Then water started to bubble up again (JA 27), and another well was dug. This was probably in June, 1948 (JA 27). As late as November of that same year the bubbling started and a man was sent to pump it out (JA 29). It was not until January 6, 1949 that the plaintiffs decided that the defendants did not in good faith intend to correct the situation (JA 66). In October, 1948, nearly seven months after the discovery of facts which put the plaintiffs on notice about the working of the septic system, they nevertheless continued in possession. As an indication of the permanency of their intention, they set out various shrubs around the house (JA 75).

At this point there is a serious question whether the plaintiffs are entitled to the relief they seek. A contract induced by fraud, is a voidable contract. It may be affirmed or it may be rescinded. The action of the plaintiffs is consistent with an intention to affirm. No intention to disaffirm is indicated. Here, the plaintiffs waited nearly a year before instituting this action for rescission.

Actually, the plaintiffs' true complaint, or claim, as disclosed by the testimony, is that the defendants have breached their contract. For the plaintiff testifies that until October, 1948, he had no reason to doubt the word of the defendants that the situation would be corrected. He just kept relying on them because he felt they must do something, there were so many people in this situation around here (JA 79). And when the defendants came and paid for pumping out the system, he, the plaintiff, was of the opinion that they eventually would do something (JA 80). Actually, he is complaining about the defendants' failure to fulfill their obligation or their promises. Indeed, in paragraph one (JA 6) of their prayers for relief, they seek in the alternative, rescission of the contract, or specific performance.

3. The Rule Requiring One Seeking Rescission to Act Promptly, is Designed for the Protection of Defendant, Who Has Changed His Position and Cannot be Placed in Status Quo.

One of the obligations assumed by the plaintiffs is represented by a first deed of trust secured on the property in question. Interest on this debt has been paid since March, 1948 (JA 69), not to the defendants, but to the Kelley Company, mortgagee. Had the plaintiffs acted promptly, and assuming they are entitled to rescind, payment of this would have been avoided. Now, if the defendant is required to accept a return of the property, the interest on this mortgage has been lost and the parties cannot be restored to the status quo.

As pointed out, the court will take judicial notice that property values have been steadily declining since 1948. Had the plaintiffs acted promptly to rescind, and of course assuming they are entitled to such relief, their prompt action would have avoided loss to the defendants caused by depreciation in the price of property.

In any event, the position taken by the plaintiffs has been one of affirmance and to permit them now in such a situation, to have the remedy of rescission, is to permit them to stand by while the defendants incur loss. The plaintiffs are estopped.

4. The Warranty, on the Sale of a House, of Its Quality and Condition, Must be Express; There Must be a Guarantee That it Will Conform to Plans, Specifications and Special Requirements.

The claim that there is here a warranty in the sale of the house is without basis or foundation. An examination of the agreement of sale, (Plaintiff's Ex. 1), and there is no evidence of any other agreement, written or oral, touching this transaction, fails to disclose any language expressly or by implication spelling out an express warranty (JA 193-197).

In the case of *Milkton v. French*, 150 Atl. 28, 159 Md. 126, a builder was engaged in improving a parcel of land and had placed the sale with an agent. Rescission was sought by a purchaser who charged misrepresentations by the agent as to the character of construction. The court denying relief because of the absence of a warranty said:

In the absence of a covenant with respect to quality and condition, there is no express warranty in the sale of a house, neither can an implied warranty be spelled out in the absence of a custom or collateral agreement that the house shall conform to plans and specifications.

In practice, the distinction made by the above case, is merely the difference between the contract builder and the speculative builder. The former builds a house according to the plans, specifications and special requirements of the owner. In the latter case, the builder completes the house for sale to the customer. In the former case, there is the warranty contended for but not in the latter. In

the case before the court, the defendants were not contract builders.

The principles of law governing warranty apply equally to real and personal property¹ and the application of these principles will be shown under the next numbered caption.

5. In the Sale of a House, in the Absence of an Express Warranty, or Special Agreement That it Will Fulfill a Special Purpose, No Warranty in Law is Implied.

The principles of implied warranty are not affected by the fact that the article sold was manufactured by the seller, or, as applied here, that the builder was the vendor. Had the builder constructed the house according to plans, specifications and special requirements of the owner, a different question would be presented. But the defendants were merely speculative builders and the completed house was sold in the open market. In such case, no warranty is implied in law. The following statement in *46 Am. Jur.*, sec. 352, states the general rule:

“It seems to be generally held according to the more modern authorities especially that where the sale is of a known, described and definite thing, though it was of the seller’s own manufacture, and such a thing is actually supplied, this will not raise by implication any warranty of quality or that it will answer the purpose for which it is purchased.”

The statement of the rule is followed by the following citations: *DeWitt v. Berry*, 134 U. S. 306, 313; 10 Sup. Ct. Rep. 536, 33 L. ed. 896; *Seitz v. Brewers’ Refrigerating Mach. Co.*, 141 U. S. 510, 12 Sup. Ct. Rep. 46, 35 L. ed. 837; *Pullman Palace Car Co. v. Metropolitan Street Ry. Co.*, 157 U. S. 94, 15 Sup. Ct. Rep. 503, 39 L. ed. 632.

¹ In the sale of personalty, there is a distinction made where the matter is controlled by statute, such as the Uniform Sales Act, but no such statute controls sales of real estate.

In the *Seitz* case there was a written contract for the sale of a refrigerating machine at a fixed price. The machine was manufactured by the seller. The buyer claimed a representation that the machine would cool a given space at a fixed low temperature. The representations were not established and the written contract contained no warranty. However, an implied warranty was claimed. After the installation of the machine, the buyer became dissatisfied and asked for a written guarantee to which the seller replied (Page 513) that it was not proper to do so because "the maintenance of a certain temperature . . . is not solely dependent upon (the refrigerating machine); in fact, there are a great many other things entirely beyond the control of the machine which influence this temperature. The mode of working the rooms, the water used for washing, the fermentation, and many other things might be mentioned in this connection as matters we cannot control, and which nevertheless are most important considerations in the maintenance of a given temperature." At Page 518 the court states the rule:

"The rule invoked is, that where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the rule, as expressed in the text books and sustained by authority, that where a known, described and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Citing *District of Columbia v. Clephane*, 110 U. S. 212, 3 Sup. Ct. Rep. 568, 28 L. ed. 122; *Kellogg*

Bridge Company v. Hamilton, 110 U. S. 108, 3 Sup. Ct. Rep. 537, 28 L. ed. 86.

And further on Page 519, the court says:

“This is not a case of an alleged defect in the process of manufacture known to the vendor but not to the purchaser, nor of presumptive or justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, proper and efficacious for that use, but in respect to the operation of which, in producing a desired result *under particular circumstances*, the buyer found himself disappointed. (Emphasis added)

And,

“... The alleged antecedent representations as to whether the machine possessed sufficient refrigerating power to cool this brewery, were no more than expressions of opinion, confessedly honestly entertained, and *dependent upon other elements* than the machine itself, concerning which plaintiff in error could form an opinion as well as defendant; . . .” (emphasis added)

When we consider the testimony in this case and the facts they tend to prove, it will be readily seen that those facts compel the application of the rule of law announced in the *Seitz* case and that the plaintiffs are not entitled to relief.

Of course it is contended by plaintiffs that because of the condition of the soil, which they contend did not lend itself to the installation and operation of a septic tank, all of which was known to the defendants, or could have been determined by proper tests, that that of itself is “fraudulent concealment of material matters equivalent to actual misrepresentation.” What plaintiffs apparently mean is that concealment of a latent defect known to the seller has the effect of a fraudulent representation. But no such defect is established in this case.

Plaintiffs were not led to believe the property was served by a sewer. They knew what septic tanks were and had had some experience with them (JA 114). According to the experts, septic tanks do not function like sewers but are expected to work properly under normal conditions (JA 150). They are designed to take care of the usual and ordinary waste waters and improper soil is not the important factor (JA 157). An unprecedented rainfall, the largest in amount recorded in fifty years (JA 130), is certainly not indicative of normal conditions. Even the plaintiffs' experts concede that excessive rainfall will cause trouble (JA 59) and that a septic tank does not function like a sewer and does not render 100% service (JA 64).

Now, it having been established without contradiction that within a radius of three to five miles of the property in question there were about 350 houses served by septic tanks, complaint regarding septic tanks having been received from not more than 15 or 20 houses since January 1944 (JA 182) and that defendants installed these septic tanks pursuant to a permit issued by the Fairfax County, Virginia Authorities (JA 183) followed by due inspections and approval by the Sanitation Officer (JA 183-185), where then is the latent defect.

Referring back to the *Seitz* case, and noting the principles of law announced therein, we immediately observe that the vendor of the house built it (not by special contract with the vendee) for a particular use, the use as a dwelling, but not intended to produce a desired result under particular circumstances, that is to say it was equipped with a septic tank (as to which the plaintiffs were advised) that did not function like a sewer and did not function 100% under particular circumstances such as excessive rainfall, excessive use by occupants and other abnormal circumstances.

6. It Was Error to Permit Testimony of Soil Tests Made Long After Consummation of the Sale.

Here the relief sought is rescission, upon a claimed misrepresentation as to the condition of the soil and its suitability for the installation of septic tank systems of sewage disposal. But no representations were made as to soil conditions (JA 68) and no tests were made to determine suitability prior to the sale (JA 181) and no notice appears to County Officials that septic tanks should not be permitted (JA 183). Therefore, evidence of tests made after the sale was consummated prove no single element essential to the plaintiffs' case.

7. Defendants Have Fulfilled County Health and Building Requirements and Should Not be Charged With Default.

Defendants proceeded with the work of installing septic tanks only after permission granted by County Health Authorities. Testimony of the County Health Officer that the defendants were informed by him that the soil in the surrounding area was "tight" and "unsuitable", when read with the whole text on the subject (JA 192-193) merely indicates the officer's reasons for requiring an enlargement of the lot area from 10,000 to 15,000 square feet, since the permit issued nevertheless (JA 192).

CONCLUSION

It is respectfully submitted that the judgment of the court below is in error and should be reversed.

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,685

COLONIAL INVESTMENT COMPANY, a corporation,
WELLINGTON PARK ESTATES, INC., a corporation,

Appellants,

vs.

VICTOR R. TAYLOR and DOROTHY E. TAYLOR,

Appellees.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

348 Filed Mar 10 1949 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

VICTOR R. TAYLOR

and

DOROTHY E. TAYLOR

390 Washington Avenue
Wellington Park Estates
Fairfax County, Virginia
Plaintiffs

-vs-

COLONIAL INVESTMENT COMPANY

a body corporate

815 - 9th Street, N. W.
Washington, D. C.

and

WELLINGTON PARK ESTATES, INC.

a body corporate

815 - 9th Street, N. W.
Washington, D. C.
Defendants

Civil Action No. 963-'49

Complaint for Recision of Contract and/or Specific Performance and to Recover Purchase Money and Other Monies Expended to Maintain & Preserve Property and for Damages

The Complaint of the Plaintiffs, VICTOR R. TAYLOR and DOROTHY E. TAYLOR, respectfully shows to this Honorable Court, as follows:

1. That the Plaintiffs are husband and wife, and are citizens of the United States, and residents of the State

of Virginia; that the Plaintiff, VICTOR R. TAYLOR, is employed by the United States Department of Justice and maintains his office at the H. O. L. C. Building, First Street and Indiana Ave., N. W., Washington, D. C.; that the Plaintiffs bring this Complaint in their own right and as is hereinafter more fully set forth.

2. That the Defendant, COLONIAL INVESTMENT COMPANY, a body corporate, is engaged in the general real estate and building business, in Washington, D. C., and in the State of Virginia and elsewhere, and maintains its principal office and place of business at 815 - 9th Street, N. W., Washington, D. C., and is sued herein in its own right, and as is hereinafter more fully set forth.

349 3. That the Defendant, WELLINGTON PARK ESTATES, INC., a body corporate, is likewise engaged in the general real estate and building business and also maintains its principal office and place of business at 815 Ninth Street, N. W., Washington, D. C. Plaintiffs state that upon information and belief, the said Defendant, WELLINGTON PARK ESTATES, INC., is a subsidiary corporation of the Defendant, COLONIAL INVESTMENT COMPANY, a corporation, and acts as an agent for the Defendant, COLONIAL INVESTMENT COMPANY, a corporation.

4. That the Plaintiffs, VICTOR R. TAYLOR and DOROTHY E. TAYLOR, entered into a written contract with the Defendant, COLONIAL INVESTMENT COMPANY, a corporation, dated March 5, 1948, which contract was entered into in the District of Columbia, wherein the said Plaintiffs agreed to purchase from the said COLONIAL INVESTMENT COMPANY, a corporation, and WELLINGTON PARK ESTATES, INC., a corporation, and said Defendants agreed to sell to the Plaintiffs, Lots nos. 15 and 16, known as 390 Washington Avenue, Wellington Park Estates, Fairfax County, Virginia, for the total price of Seventeen Thousand Four Hundred Dollars (\$17,400.00). That the said Defendants did, on said date and prior thereto, represent to the Plaintiffs that the said dwelling

house was in the process of construction by the said Defendants, and agreed to give possession to Plaintiffs, thirty (30) days after said date. That under the terms of said contract, the Plaintiffs paid to Defendant, COLONIAL INVESTMENT COMPANY, a corporation, the sum of Three Thousand Nine Hundred Fifty Dollars (\$3,950.00), in cash, and assumed a first Deed of Trust, secured on the said premises in the sum of Eleven Thousand Two Hundred Fifty Dollars (\$11,250.00), and a second Deed of Trust, secured on the said premises, in the sum of Two Thousand Two Hundred Dollars (\$2,200.00).

5. That the said Defendants also represented to Plaintiffs that the said dwelling house would be completed in every respect in a workmanlike and first-class manner, and that the said dwelling house would be fit for human occupancy. Plaintiffs state that there was an implied agreement and warranty that said dwelling house, when completed, would be fit and suitable for human occupancy.

350 6. That notwithstanding their representations, and notwithstanding the said warranty, the said Defendants failed to complete and construct the said dwelling house in a workmanlike and first-class manner, and have failed to make the same suitable for human occupancy, in that the said Defendants installed a septic tank system, although they knew that the soil upon which the dwelling was constructed lacked sufficient percolation qualities to properly and adequately lend itself to the installation of a septic tank system, and in that the said Defendants failed to install a proper hardwood flooring, but did install improper flooring which has become warped, soft and discolored, and in many places has become completely separated, and is defective and in a dangerous condition.

7. That pursuant to the said contract, the Plaintiffs took possession and moved into the said dwelling house on or about March 26, 1948. That although the Defendants have repeatedly assured the Plaintiffs that the said septic

tank system would function properly and would be adequate, nevertheless, the said system is not functioning properly and is defective and has resulted in an unsanitary condition within, and outside of the said dwelling house, and because of the said soil condition, cannot be made to function properly, and that it has been necessary for the Plaintiffs to make periodic and continuous repairs to the said septic tank system and have the same pumped frequently, so that the said dwelling house may be maintained at the very minimum capacity for human occupancy.

8. That the Plaintiffs have advised the Defendants of the said conditions, and that the said Defendants have repeatedly promised that said conditions would be corrected, but they have wrongfully failed to properly perform said contract or to complete the said contract, or to correct the said defective conditions.

9. That the Plaintiffs have constantly, from the date of possession up to and including the present time, expended much time, suffered considerable personal inconvenience, put forth much effort and labor, all to the
351 end that said dwelling house would be habitable; and they have necessarily expended large sums of money in an effort to make said septic tank system proper and suitable for human needs, but that because of the condition aforesaid, the said septic tank system cannot function properly or be repaired and maintained, but that the same must be altogether abandoned and a soil pipe system installed for the purpose of connecting up with a regularly established and maintained public sewer system, all of which will involve expenditure of a considerable and substantial amount of money, and constitutes a substantial breach of the contract on the part of the said Defendants.

10. Plaintiffs state that in view of the aforesaid conditions and breach of contract, on the part of said Defendants, there has been a failure of consideration and the Plaintiffs have offered to return the said dwelling house to the Defendants, and now tender a return of said dwelling

house to the Defendants, and request that they be restored completely to all of the sums of monies paid by them to the Defendants and applied towards the purchase of said dwelling house, and such sums which they expended in order to preserve, maintain and improve the said dwelling house for the Defendants.

WHEREFORE, the Plaintiffs bring this suit against the Defendants and demand as follows:

1. That the Court rescind the Contract entered into by and between the Plaintiffs and the Defendants herein for the purchase of said real estate, and/or direct the Defendants to specifically perform said Contract by completing the said dwelling house and the correcting of defects therein, including the installation of a proper plumbing and sewerage system.

2. That the Plaintiffs recover judgment against Defendants in an amount equal to the purchase money paid by them, namely Three Thousand Nine Hundred Fifty Dollars (\$3,950.00), together with all subsequent payments of principal and interest made by them for the purchase of said real property.

3. That the Plaintiffs recover judgment against the Defendants in the sum of Two Thousand Dollars 352 (\$2,000.00) for monies expended by them in order to improve, maintain and preserve said premises for and in behalf of the Defendants, and that they also be awarded judgment in the sum of Five Thousand Dollars (\$5,000.00) for punitive damages.

4. And for such other and further relief that the Court may deem just and proper.

/s/ I. Irwin Bolotin

I. Irwin Bolotin

/s/ M. Taft Woodruff

M. Taft Woodruff

Attorneys for Plaintiffs

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353 Filed Mar 22 1949 Harry M. Hull, Clerk

*Answer of the Defendants to Complaint
First Defense*

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The plaintiffs are not entitled to trial by jury.

Third Defense

The plaintiffs are not entitled to punitive damages.

Fourth Defense

Upon the claim for rescission, the plaintiffs fail to tender the amount of the fair and reasonable use of the property.

Fifth Defense

1. These defendants are willing to admit the residence of the plaintiffs but say that the fact that one of the plaintiffs is employed in the District of Columbia is of no legal significance.

2. The defendant Colonial Investment Company is engaged in the general real estate business in the District of Columbia and has its principal place of business there, but all the other allegations are denied.

3. The defendant Wellington Park Estates, Inc., is engaged in the building business and maintains its
354 principal place of business in the District of Columbia but all other allegations are denied.

4. The contract of purchase dated March 5, 1948, was entered into with defendant Wellington Park Estates, Inc., the defendant Colonial Investment Company merely acting as agent, and the contract so recites. For further answer hereto these defendants say that the terms of sale are embodied in the contract to which reference is made. Defendants admit the receipt of the payments specified.

5. The allegations of fact contained in this paragraph are denied and defendants say that all other allegations of an implied agreement or warranty are allegations of a conclusion of law and need not be answered.

6. These defendants deny that they made any representations with respect to the property, and deny any warranty, express or implied, and deny that they failed to complete the improvements in a workmanlike and first class manner and deny that the installation of the septic tank system was improper or inadequate and deny the installation of improper flooring. They have no knowledge or information sufficient to form a belief as to the now condition of the flooring, but deny that such condition, if it exists, is due to any default on the part of these defendants.

7. It is admitted that the plaintiffs took possession and moved into the dwelling house on or about March 6, 1948, but these defendants deny any assurances respecting the improvements consisting of the house and septic tank system, and deny that the said system is not functioning properly and is defective.

8. These defendants admit that they were advised of the necessity on one occasion of pumping the septic tank due to unusual weather conditions, but deny any failure on their part as alleged.

9. These defendants have no information or knowledge sufficient to form a belief as to the allegations of
355 paragraph 9, and they aver further that if any condition exists as charged, it is not due to any default on the part of these defendants.

10. These defendants are advised that the allegations of paragraph 10 are allegations of conclusions of law and need not be answered.

/s/ Jacob N. Halper
Jacob N. Halper
1511 K Street, N. W.
Washington, D. C.
Attorney for Defendants

356 Filed Nov 16 1949 Harry M. Hull, Clerk

Pretrial Proceedings

STATEMENT OF NATURE OF CASE:

Suit against Colonial Investment Co., selling agent, and against Wellington Park Estates, as the builder and owner seeking to rescind contract made by plaintiffs to purchase a dwelling in Wellington Park Estates, Fairfax County, Va. and to recover purchase money paid, money spent on improving premises and for damages.

Plaintiffs maintain they contracted with defendants to purchase the above property while it was in course of construction and that under the contract defendants were required to furnish a dwelling reasonably suited for occupancy, with equipment of bathing and toilet facilities; that when plaintiffs took over the premises continuously thereafter there were defects in the buildings, consisting of warped floors, inadequate plastering and other defects on the inside and outside and, particularly, that the sceptic tank for bathing and toilet facilities was not properly installed and has not functioned; that due to the contour and topography and state of soil it was not possible to bring about proper functioning. Underground conditions are also relied upon.

Plaintiff claims recovery of sums paid on dwelling, insurance, taxes and certain work done on tank and building of both interior and exterior; also claims punitive damages, maintaining fraud in selling property in this condition.

Defendants deny that any of the conditions in the house did not reasonably fit for occupancy and use and further maintain that any conditions in regard to the sceptic tank were due solely to the abnormal conditions of the weather, by rainfall and improper use by plaintiffs.

Defendant maintains that sale of the property to plain-

tiffs was a sale without warranty and without the usual terms of construction contract. Defendant also denies the conditions claimed by plaintiff.

Defendants maintain claims plaintiffs have not made a valid tender of the house as required in the rescission and also has not made a valid tender of compensation for use of the house.

Parties stipulate that within 10 days defendants' counsel together with other representatives of defendant, not more than 2, will make inspection of the premises involved in this suit.

Parties further stipulate that any judgment obtained against either defendant may be entered against the other defendant.

At Pretrial, plaintiffs elect to rely upon their claim to rescind and obtain payments above set forth rather than claim specific performance of the contract.

357 STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

Parties stipulate that demand for jury trial is withdrawn.

Plaintiffs claim express and implied warranties representative of defendants with regard to the suitable condition of premises.

Documents bearing the initials of the Court may be received in evidence without formal proof.

Photograph bearing the initials of the Court may be received in evidence without formal proof.

Dated Nov. 15, 1949

/s/ Bolitha J. Laws

Pretrial Justice.

REMARKS of Pretrial Justice for consideration of Trial Justice:

• • • •

358 Filed Apr 3 1950 Harry M. Hull, Clerk

This cause came on to be heard upon the pleadings, evidence and argument of counsel, and the Court being sufficiently advised in the premises, makes its Findings of Fact and states its Conclusions of Law thereon:

Findings of Fact

1. On March 5, 1948, the Plaintiffs, Victor R. Taylor and Dorothy E. Taylor, as vendees, entered into a written contract with the Defendants, Colonial Investment Company and Wellington Park Estates, Inc., as vendors, for the purchase of Lots numbered 15 and 16, improved by a dwelling house thereon known as 390 Washington Avenue, Wellington Park Estates, Fairfax County, Virginia, for a total purchase price of \$17,400.00.

2. That on March 5, 1948, prior to the execution of said contract, the said house was exhibited to Plaintiffs by one Earnest W. Lewis, an agent for Defendants, at which time the house was incomplete and in the process of construction, and the said agent told Plaintiffs that it would be completed in a first-class and workmanlike manner. In response to specific inquiry by Plaintiffs the agent stated that the septic tank system servicing said house would

work properly and would require cleaning once
359 every three to five years, and furthermore that no other owners of dwellings in this area were experiencing any difficulties with their septic tank systems. These statements were untrue.

3. Plaintiffs, relying on the representations made by the agent, moved into the house on March 27, 1948. The septic tank system did not function properly on that date and required immediate pumping and cleaning. Defendant Colonial Investment Company, being promptly notified of said condition, authorized and paid for the cleaning and pumping of the septic tank system on March 29, 1948, and assured Plaintiffs that it would thereafter work properly.

4. The said septic tank system has not functioned properly since the date Plaintiffs moved into the house and has required continuous pumping, cleaning and repairing. Defendants made numerous attempts to correct said defective condition from March, 1948, to January, 1949, and authorized and paid for its cleaning and pumping on several occasions during that time and repeatedly promised and assured Plaintiffs that the defect would be corrected and the septic tank system made to function properly.

5. Defendants notified Plaintiffs by letter dated January 5, 1949, that they would no longer continue their efforts to correct the defective septic tank system. This was the first notice to the Plaintiffs that the Defendants did not intend to correct the defective system.

6. The Fairfax County Health Department requested the Virginia State Health Department to investigate the improperly functioning septic tank systems located at the Wellington Park Estates sub-division in order to discover the source and reason for said condition. The examination made by the Virginia State Health Department on October 27, and October 28, 1948, of the Wellington Park Estates sub-division, including the premises of the Plaintiffs, disclosed that the soil was hard-pan, and by its nature would not absorb water, and accordingly was not suitable for septic tank construction; that the underground water table was too high to permit proper absorption and drainage; and that the septic tank systems had not been properly constructed.

7. That prior to commencing construction, the Defendants had been advised by Harold David Baker, Sanitation Officer for the Fairfax County Health Department, that the soil in the contemplated sub-division was tight
360 and not suitable for septic tank construction.

8. Owners of other dwellings constructed and sold by Defendants in the immediate vicinity of the house purchased by Plaintiffs experienced similar difficulties with their septic tank systems prior to March 5, 1948. Defend-

ants knew of these existing problems and had knowledge of such difficulties prior to March 5, 1948, and withheld this information from Plaintiffs.

9. The dwelling house purchased by Plaintiffs was not completed in a first-class and workmanlike manner. The septic tank system was improperly constructed and cannot be made to function properly because of the soil conditions. The factors concerning the soil conditions were known to Defendants prior to March 5, 1948, and were unknown and concealed from Plaintiffs. The conditions resulting from the septic tank system are unsanitary and potentially dangerous to the public health, and materially affect the habitability and enjoyment of said premises.

10. The statements made by the agent, Ernest W. Lewis, were untrue and concerned material facts, and were known by Defendants to be untrue, and were made to induce Plaintiffs to purchase the property. Plaintiffs believed said representations to be true and relied on them.

11. Plaintiffs made a proper and continuing tender to return said house to Defendants immediately upon learning the facts which entitled them to rescind the contract of March 5, 1948.

12. Plaintiffs have made payments towards the purchase of said house and for its maintenance, repair and improvement in the sum of \$7,988.75, as is set forth in detail in Exhibit "A" which is attached hereto. Interest on said payments at the rate of six per cent per annum computed from the date of payment to March 20, 1950, is in the total sum of \$785.12. Counsel have stipulated that the payments as set forth in said Exhibit "A" were made by the Plaintiffs on the dates indicated.

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Conclusions of Law

1. Plaintiffs are entitled to rescind the contract executed on March 5, 1948.

2. Plaintiffs are entitled to recover the amount of payments made by them towards the purchase, maintenance,

improvement and repair of said house in the sum of \$7,988.75, together with interest at the rate of six per cent per annum computed from the date of payment to March 20, 1950, in the sum of \$785.12, making an aggregate sum of \$8,773.87, as is more specifically detailed in Exhibit "A" attached hereto, less the sum of \$2,612.50, which the court has determined to be a reasonable rental for use and occupancy for the period from March 27, 1948, to March 20, 1950.

3. That Plaintiffs, upon their receipt of payment of said judgment shall execute a deed reconveying said property to Defendants.

4. The Plaintiffs are entitled to all taxable costs.

/s/ Burnita Shelton Matthews
Judge

GROUP 1

Includes down payments, settlement fees, payments to Kelly & Co. on first trust, Colonial Investment Company on second trust, 1948 property taxes, fire insurance, water payments, sewage disposal.

<i>Date of Payment</i>	<i>Amount</i>	<i>Interest at 6%</i>	<i>Total</i>
3/5/48	\$ 500.00	\$ 61.23	\$ 561.23
3/12/48	950.00	115.25	1,065.25
3/26/48	2,784.78	331.43	3,116.21
4/26/48	71.21	8.11	79.32
5/26/48	71.21	7.76	78.97
6/26/48	71.21	7.40	78.61
7/26/48	71.21	7.05	78.26
8/26/48	71.21	6.68	77.89
9/26/48	71.21	6.32	77.53
10/26/48	71.21	5.97	77.18
11/26/48	71.21	5.61	76.82
12/26/48	71.21	5.26	76.47
1/26/49	71.21	4.89	76.10
2/26/49	71.21	4.53	75.74
3/26/49	71.21	4.20	75.41
4/26/49	71.21	3.84	75.05
5/26/49	71.21	3.49	74.70
6/26/49	71.21	3.13	74.34
7/26/49	71.21	2.77	73.98
8/26/49	71.21	2.41	73.62
9/26/49	71.21	2.05	73.26
10/26/49	71.21	1.70	72.91
11/26/49	71.21	1.33	72.54
12/26/49	71.21	.95	72.16

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<i>Date of Payment</i>	<i>Amount</i>	<i>Interest at 6%</i>	<i>Total</i>
1/26/50	\$ 71.21	\$.62	\$ 71.83
2/26/50	71.21	.25	71.46
Totals	<u>\$5,872.61</u>	<u>\$604.23</u>	<u>\$6,476.84</u>
4/26/48	\$ 32.00	\$3.65	\$ 35.65
5/26/48	32.00	3.49	35.49
6/26/48	32.00	3.32	35.32
7/26/48	150.00)	18.01	200.01
	32.00)		
8/26/48	32.00	3.00	35.00
9/26/48	32.00	2.84	34.84
10/26/48	32.00	2.68	34.68
11/26/48	32.00	2.52	34.52
12/26/48	32.00	2.36	34.36
1/26/49	32.00	2.20	34.20
2/26/49	32.00	2.04	34.04
3/26/49	32.00	1.89	33.89
4/26/49	32.00	1.73	33.73
5/26/49	32.00	1.57	33.57
6/26/49	32.00	1.40	33.40
7/26/49	32.00	1.25	33.25
8/26/49	32.00	1.08	33.08
9/26/49	32.00	.92	32.92
Totals	<u>\$726.00</u>	<u>\$55.95</u>	<u>\$781.95</u>

<i>Date of Payment</i>	<i>Amount</i>	<i>Interest at 6%</i>	<i>Total</i>	
11/29/48	\$70.18	\$5.49	\$75.67	— 1948 taxes
4/11/49	61.88	3.48	65.36	— Kelly Co. fire insurance
2/23/50	61.88	.25	62.13	— Kelly Co. fire insurance
3/9/48	15.00	1.83	16.83	— Colonial water bill

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<i>Date of Payment</i>	<i>Amount</i>	<i>Interest at 6%</i>	<i>Total</i>	
6/27/49	\$15.00	\$.65	\$15.65	— Colonial water bill
2/5/50	5.00	.03	5.03	— Sydnor pump & well bill
1/8/49	25.00	1.79	26.79	— Sewage removal
1/29/49	60.00	4.09	64.09	— Sewage removal
Totals	<u>\$313.94</u>	<u>\$17.61</u>	<u>\$331.55</u>	

GROUP II

Includes air conditioner, book shelves, plumbing and furnace repairs, electrical outlets, venetian blinds, double curtain rods in each room, fire screen, chrome shelves, towel rods, hooks, fixtures, etc.

<i>Date of Payment</i>	<i>Amount</i>	<i>Interest at 6%</i>	<i>Total</i>	
3/25/48	\$ 34.50	\$ 4.11	\$ 38.61	— Air conditioning payment
5/18/48	400.00	44.12	444.12	— Air conditioning payment
4/10/48	56.00	6.53	62.53	— Tabert Wood. book shelves
9/4/48	56.00	5.17	61.17	— Moore electrical outlets
11/9/48	25.00	2.04	27.04	— Pangborn venetian blinds
1/23/48	13.80	1.78	15.58	— Stylecraft curtain rods
1/9/48	28.00	3.68	31.68	— Wheatley fire screen
12/1/48	15.00	1.17	16.17	— Paul Moore, furnace repair
3/12/48	25.00	3.03	28.03	— Paul Moore, furnace repair
3/27/49	7.00	.41	7.41	— Paul Moore, furnace repair
1948	5.00		5.00	— chrome shelves & fixtures
Totals	<u>\$665.30</u>	<u>\$72.04</u>	<u>\$737.34</u>	

GROUP III

Includes outside electrical sockets, wiring, expert landscaping service, trees, shrubs, flowers, extra sod and soil, portion of amount paid to gardener.

<i>Date of Payment</i>	<i>Amount</i>	<i>Interest at 6%</i>	<i>Total</i>	
7/15/48	\$59.00	\$5.94	\$64.94	— Zimmerman, electrical work

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<i>Date of Payment</i>	<i>Amount</i>	<i>Interest at 6%</i>	<i>Total</i>	
4/11/48	\$10.00	\$1.16	\$11.16	— Capper, landscaping
5/20/48	15.50	1.68	17.18	— Smith & Kennedy, shrubs
5/11/48	43.50	4.85	48.35	— Capper, shrubs & trees
6/24/48	25.90	2.70	28.60	— Kensington Landscaping
7/23/48	67.00	6.66	73.66	— Smith, shrubs
10/22/48	12.00	1.01	13.01	— Yeager, soil
12/21/48	5.00	.37	5.37	— Walters, trees & shrubs
12/1948	3.00		3.00	— Moore, shrubs
1948	25.00		25.00	— 20 hrs. labor @ 1.25 hr.
11/19/48	70.00	5.59	75.59)	— Contract with Capper for
1/12/49	75.00	5.33	80.33)	landscaping & trees, shrubs
Totals	<u>\$410.90</u>	<u>\$35.29</u>	<u>\$446.19</u>	

RECAPITULATION OF GROUP I

\$5,872.61	\$604.23	\$6,476.84
726.00	55.95	781.95
313.94	17.61	331.55

<u>\$6,912.55</u>	<u>\$677.79</u>	<u>\$7,590.34</u>
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GRAND RECAPITULATION

Group I	\$6,912.55	\$677.79	\$7,590.34
Group II	665.30	72.04	737.34
Group III	410.90	35.29	446.19
Totals	<u>\$7,988.75</u>	<u>\$785.12</u>	<u>\$8,773.87</u>

* * * *

Filed Apr 3 1950 Harry M. Hull, Clerk

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Order

This cause came on to be tried before the Court, and the evidence adduced by the parties having been heard, and the Court having made its Findings of Fact and Conclusions of Law, it is by the Court this 3rd day of April, 1950,

ADJUDGED, ORDERED AND DECREED AS FOLLOWS:

1. That the Plaintiffs Victor R. Taylor and Dorothy E. Taylor have judgment and recover of the Defendants Colonial Investment Company, a corporation, and Wellington Park Estates, Inc., a corporation, the sum of \$6,161.37, and their costs, and that Plaintiffs have execution therefor.

2. That the Plaintiffs Victor E. Taylor and Dorothy E. Taylor execute a deed reconveying said property to the Defendants upon their receipt of payment of said judgment.

/s/ Burnita Shelton Matthews
Judge

* * * *

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Filed May 1 1950 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 1st day of May, 1950, that COLONIAL INVESTMENT COMPANY, a corporation, and WELLINGTON PARK ESTATES, Inc., a corporation hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 3d day of April, 1950 in favor of VICTOR R. TAYLOR and DOROTHY E. TAYLOR against said COLONIAL INVESTMENT COMPANY, a corporation,

and WELLINGTON PARK ESTATES, Inc., a corporation.

/s/ Jacob N. Halper
Jacob N. Halper
Attorney for defendants

* * * *

13

Victor R. Taylor

was called as a witness for the plaintiffs, and being first duly sworn was examined and testified as follows:

Direct Examination

* * * *

Q You live presently at 390 Washington Avenue, Wellington Park Estates, Fairfax County, Virginia, which is the dwelling house in controversy herein, is that correct?

A That's correct.

* * * *

Q Mr. Taylor, coming back to this specific problem confronting the Court, you and your wife were
14 interested in purchasing a home just prior to March 5, 1948, is that correct? A That's correct.

Q From that point on, please tell the Court what you did with reference to making inquiry, inspecting, and negotiating for the purchase of the house you are now living in.

* * * *

THE WITNESS: On March 5, 1948, I went down to the place I purchased. My wife previous to this time had looked around for a home. We were living in a little one-room place. So we went down to this place, and it looked very nice. It was not completed at the time.

BY MR. BOLOTIN:

Q When you say you went to this place, how did you become familiar with the existence of this place?

A My wife had read an ad in one of the papers and had called one of the salesmen of Colonial Investment. This salesman came and picked her up and then she called me and we went down together.

Q What is the salesman's name, Mr. Taylor? A Lewis.

15 Q His last name? A Lewis is the only name I know him by.

Q For the purpose of the record, Mr. Taylor, would it be this "Ernest W. Lewis," who signed the contract?

A Yes.

* * * *

Q Will you proceed, Mr. Taylor. A There were workmen around the place, and we went in. The salesman gave us the usual sales talk, a lot of it, of course, puffing—said that General Wedemyer bought a place up the street; and across, immediately on what is now known as Greenway and Washington Streets, where they converge, that that was to be a beautiful park; that the place was highly restricted; that there would only be forty homes built there; and that they were very, very—wanted to be careful with the people that they got in the place; it was to be a wonderful little community.

Naturally, I was curious about the house. We went in and the first thing, you walked in and there was the Bendix. I liked that, because that cuts down laundry bills. All nice and shiny white. Then I asked about the rest of the construction. The man assured me that it was the very finest of materials, first-class construction. I told him that I thought it ought to be for the price we were paying. It was a little more than normally you would pay for two people—\$17,000. Then he took us in and showed us all through, into the bathroom, and so on.

16

Q How many bathrooms, Mr. Taylor? A One. I asked him about the sewage, what happened to it. He said a septic tank. Well, I had never lived where there was such a thing as a septic tank. I had probably read about them, but I knew nothing about them. I asked him how it functioned. He proceeded to tell me that the water went in a big tank, which he said went through here, and that the water would come out, and that it would go through some pipes and then it would go into the air.

I said, "Does it work?"

He said, "Yes, they have been in use for years and years."

I said, "Do you ever have any trouble with them? I'd like to know that."

He said, "Well, you have to have them cleaned out once every three to five years." I let it go at that.

Then I asked him, naturally, about the walls, how they were built, and all there was—everything was just fine. I asked him about—in the garage, which we don't use, there was a big pile of wood blocks, and I asked him what they were, and he said they were being used on other places, and so on.

17 I said, "Is it good wood?"

He said, "Yes, it's the finest we can buy, and I want to assure you over and over it is the very finest of materials."

And I said, "Well, it looks good." So we went back to the office and signed the contract for sale.

Q Before you come to the signing of the contract, I would like to ask you two or three more specific questions. You didn't tell the Court the type of flooring in the house. A It's hardwood parquet floor. That is, where they put them in in blocks.

Q Those blocks are about ten by ten, are they? Or twelve by twelve? A Something like that, I wouldn't know the exact size.

Q Was that flooring in when you inspected the house on March 5th? A Well, it was in but it was not completed. There was a lot of—it wasn't finished. That is, I think they call it sanding, or whatever they do to it.

Q The flooring itself was in, but it hadn't been finished, it hadn't been sanded and polished? A That's right.

Q Mr. Taylor, to help the judge get a complete picture of this house, it is a one-story house, is that correct? A Yes.

18 Q Of the rambling type? A Rambler type.

Q How many bedrooms, please? A Well, there are so-called three, but it's really two bedrooms and a—I don't mean to be impertinent, but almost a cell, a very, very small room, six by—or maybe—I don't know the size; it is very, very small; it may be six by ten or something of the sort.

Q There is no basement in the house, correct? A No.

Q And the flooring itself is built directly upon a concrete slab which is the foundation of the house, is that correct? A Yes. The man explained to me that—this is another question I asked him at the time, how it was heated, no radiators. He said it was radiant heat.

Q Tell the Court what radiant heat is, will you please? A Radiant heat, as I understand it—they lay a cement slab down and then they put pipes, which are cemented in, and they go at different angles, I suppose, like this (indicating). That isn't good for the record, I beg your pardon. It goes in, probably, "U" shapes, all over.

Q The pipes are imbedded in the concrete, is that correct? A Imbedded in the concrete.

19 Q And then the wood floor is laid directly on top of the concrete? A Yes; I think there is some sort of a filler or something they put in between. I don't know what it is.

Q Probably acts as a sort of absorber between? A

I really don't know. I don't know. All I know is you have, simply, pipes all over the floor of the house, and that is the way the house is heated.

Q Mr. Taylor, I think you told us that he assured you that the construction and materials were in first-class condition? A That's right.

Q Did you ask him any questions about the flooring? A I asked him about that. I asked him what effect, if any, this heat will have. He said, "You don't have to worry about this, because this is all cured dry wood.

Q You started to tell us that you went back to the office of the Colonial that same day to sign the contract, is that right? A That's correct.

Q Will you proceed from that point on? A We signed the contract.

* * * *

20 BY MR. BOLOTIN:

Q Mr. Taylor, the contract price, I note, is \$16,950. Was that changed or amended, or added to?

A There was an additional bill of \$450.

Q What was that for, sir? A My wife wished certain changes made in the house. She wanted a door cut from the kitchen into a small bedroom. She wanted a—and we had an electric—a fan put in to draw the odors out of the kitchen. She had the house painted white. It was the conventional red brick, and she wanted it white. And there were several items that amounted to some \$450.

* * * *

21 Q You have answered my question as to a modification or addition to the contract? A That's right.

Q Did you have occasion to go back to the premises between March 5th and the date you moved into the premises? A I went back once, at least. I don't know whether my wife went more than that. I went with my wife on one occasion.

Q The purpose of that was to follow the progress?

A To look it over, to see how it was coming along, and to get an idea of how you were going to landscape it, and to see how you would fix the inside, and all that sort of thing.

Q There came a time, of course, when you actually moved into the house, is that correct? A That's right.

Q Will you tell the Court the date that you moved into the house? A We moved in the house on
22 Saturday, March 27. As soon as we arrived we were, of course—some of the neighbors came around to greet us. We moved our furniture in, which we had previously purchased for this house. And after we had been there a very few minutes, we were looking the place over and I went into the bathroom and I noticed that the toilet wouldn't flush. And there was an old gentleman in the neighborhood who happened to be there, and he said, "The water isn't turned on." So the water was turned on, and it flushed, and the water came just about to the top of the bowl.

Well, of course, we were panic-stricken. So we ran to—went over to a neighbor and telephoned Colonial and couldn't get anyone, and, of course, we had to do without a bath.

Then to make things a little worse we brought a lot of groceries along. We put them in the refrigerator and went to turn that on, and that didn't work. So it was a very, very unhappy weekend. On the following Monday the Colonial people came out and they attached a pump to the septic tank.

Q Mr. Taylor, with relation to the house, where is this tank located? A The tank is located on the northeast corner of the house.

Q Is that to the side, front or rear of the house? A That's the rear of the house.

23 Q Will you proceed, please. A They put a pump into the tank. I had to go to work, but I

noticed they hooked the pump in and they ran the water, which was right full, naturally, ran it right out along the north side of the house on a long hose into the gutter. Pardon if I repeat myself—I went to work, and when I came back that night there had been a well dug. I don't know—they call it a dry well. And of course, I was pretty upset about the whole thing, and, naturally, my wife.

And they assured us that this would be the cure for it. That situation obtained for—we had no—

Q Mr. Taylor, I am sorry, but this well you are talking about was dug on the Monday after you moved in?
A Yes.

Q That was to, as you say, cure the— A Yes, they said it would drain it, whatever it does. I don't know just how these things work, but that was supposed to be the cure. And one Levick assured us that we won't have any more trouble.

Q Who is Mr. Levick, do you know? A Mr. Levick, as near as I know, is the superintendent of this particular—these buildings. I don't know. He was an employee, and he informed me that all his recommendations, whatever recommendations he made to his boss, as
24 he said, would be acceptable; whatever he said went.

* * * *

MR. BOLOTIN: Do you know his capacity or title?

MR. HALPER: No, I don't, but that is his name, and it is admitted he is an employee.

THE WITNESS: Whatever it was, you report it to him, and he seemed to get things done.

* * * *

Q * * * Did the toilet and bathing fixtures work properly after this condition was corrected on March 29?

A Well, it went on for a very, very short time.

Q Tell the Court, please, what happened. A I think everything went on for some few weeks, I would say. I

don't want to say exactly how long, but it was a very short time, and again we had this situation where you were frightened. This water started to bubble up
25 in the toilet again, and we again called the Colonial people, and they sent out a crew of men and they dug another well. I came home that evening and there was water—I asked one of the workmen still there; they said they were down twenty feet, if I recall. There was water there. That was supposed to be the final cure. Whether it was immediately after, or a day or two after, I don't know. That didn't seem to do the job, because that filled up with water from below, and then they dug still another well. These wells were dug on the outside of the drainage field, which is back of the house, east. And that was supposed to be the final cure; that would fix it.

Q Mr. Taylor, you said a few weeks. Can you place approximately what month this occurred? A May I look here? Let's see, that was probably the latter part of—well, probably in June, the last part of May or first part of June.

Q 1948? A Yes.

Q Was that period of time, with reference to rain, fairly dry or unusually wet, do you recall? A Of course, in this country you get lots of rain, anyway. I don't recall whether it was anything exceptional. I have lived here so long that you expect lots of rain. I don't know.

26 Q Did there come a time, Mr. Taylor, when you stopped using the Bendix washing machine? A Well, I believe that shortly, or about that time, that we both had fears, we were both fearful of taking a bath because we didn't know when it was going to back up, and we always kind of held our breaths—that is sort of a colloquialism—I think about that time my wife ceased to use—I think she probably used the Bendix twice in the interim between the well diggings, but she ceased.

Q About June, '48? A Yes.

Q That facility has never been used? A Not been used.

Q Mr. Taylor, have you finished telling us as to what happened with the digging of the well, and so forth, during this period early summer of '48? A Yes, I think that was the end of that particular period.

Q Were the bathing and toilet facilities functioning properly as soon as that well was dug, and the condition corrected? A When you say function properly, you always were worried. You could take a shower and do the rest of it, but you just lived in fear. When you say function properly, you wouldn't know. You always
27 lived in fear, that's all. I would say it would, for all I knew.

Q It was useable? A Oh, yes, it was useable.

Q Did there come a time thereafter that you began to experience more trouble so as to make it impossible to use those facilities? A Well, in the meantime, during that summer, of course, the place was nothing but clay, and I worked very hard, and the thing that we were upset about then, the floor started to swell. We didn't know what was happening to that. I remember that in the latter part of August the floor running from—you come into the house from the west, you go in a little sort of entrance, and from the entrance running from south to north the whole house swelled up into, I should say, about, it seemed to me, 30 degrees. It seemed like you had to step two feet over, which is an exaggeration—probably six to seven inches. It just went in a peak, like this. (Indicating)

I called the Colonial people about that. I called a Mr. Levin. I don't know how he pronounces his name. And he suggested that the way that could be cured was to turn on the heat, that there was moisture under there. Well, I must say I was very angry about that, to turn on the heat in August in Washington to have the floor shrink down. I didn't do it.

Well, things then went on until September. Then
28 we began to have sort of little rumblings. When
you would flush the toilet or anything, it would go
down slowly. And that situation obtained until some
time in November. And then it just came, just about
over, and I went out to the back and I could see where
something was radically wrong. And I called Colonial
and they sent a man out and he pumped it out. I think
this was the—I don't recall the date in November, but
it was in late November.

Q The person who pumped it out in November '48
was sent by Colonial? A Yes.

Q And that is Mr. Ashley? A Mr. Ashley.

Q A-s-h-l-e-y? A Yes.

Q And he is present in court here today, is that cor-
rect? A Yes.

Q You may proceed. A Mr. Ashley pumped it out
on that occasion, and then he pumped it out—I don't re-
call the exact dates; it was a short time later, probably a
couple of weeks. It was pumped out again. So I watched
to see what the difficulty was. His tank, the big tank
that he uses to put it in, he said, holds a thousand gal-
lons, and the septic tank itself was supposed to be
29 a thousand gallons. We noted that his truck would
be full, and there would be still water sewage drain-
ing back into the tank. So he'd come back and have to
take another load, or another partial load.

We complained about all of these things, and I was
assured by—I think I talked to Mr. Taube, or talked to
anyone I could get—that they were making an investiga-
tion, that they were doing everything they could. This
went on until, I think, Christmas Eve. I know we had
to have it pumped out then. New Year's day. And then
I think the 4th of January. It was a very, very short
time after. In the meantime, I had gone to Mr. Taube.

Q That is T-a-u-b-e? A Yes.

Q And he is the president? A I understand that he

is the man who owns it or is the president or general manager. I don't know his official title. And I had had many other little things go wrong with the house. I talked to this Levin—if I might go back a little.

Q That is all right. A And he said, "Send us a letter with all of these complaints and we will take care of them at once." And on about the 9th of December they did send some men out there. They did a little patching, put down some moulding that was bad.

30 I asked him about the floor, and he said they won't fix the floor.

Q Mr. Taylor, you haven't told the Court the condition of the floor yet. A The floor after the heat comes on, it would go down and it would separate, and it would be uneven. It wasn't smooth at all. You would have one of these squares, a place would stick up like this. That is, it seemed probably an eighth of an inch, something like that, very rough. And then you would find gaps, maybe a quarter of an inch, or maybe a half inch. It just spread like this all over the house. And as you walk in some places, it gives. It sounds like you are going to slide all the way down, like there is no foundation.

Their man told me that they would not fix the floor. Mr. Taube told me he would not fix the floor. I also complained about the bathroom. There is a part of the tilework, when we moved in had been patched, and they sent a man who put it in, to fix it, and he said, no, he would not fix it, it was too expensive, he would have to tear it out. I don't know who he was, someone the people sent out.

They did do some other work where it had been chipped—some of the moulding around the tile was chipped, and they put in new pieces like that.

Q Coming back to the trouble you experienced
31 with the septic tank during that winter of '48 and early '49, I don't think you quite finished your

testimony in that respect. A Of course, during that period we lived in—it's so difficult for me to find a word to express—we were just horrified, or frightened to death. If we wanted to take a shower, we would run in quick and jump under and get out. When you washed dishes, you were very careful that you only used so much because you just didn't know what was going to happen. We ate out if we could. We stayed away as much as possible, to use it just as few times as possible.

In the meantime, Mr. Taube had said he was having the whole thing investigated, and he wanted to clean the situation up. Well, I was a little disgusted at the delay, and I think it was on January the 4th I called him and he said that he had received a recommendation to take care of all this, that the State of Virginia had made a recommendation, and he said what they want to do is ridiculous, their recommendation is ridiculous. He said, "I will send you a copy of the letter," which he never did, incidentally.

I also asked him if he would send me a letter in writing guaranteeing the payment of this pumping out. I think it was \$25 each time, or thirty-five, and he said he would. I received a letter the next day, in which he said that—may I refer to the letter, Your Honor?

THE COURT. Yes, certainly.

32 MR. BOLOTIN: I would like to have this identified as Plaintiff's Exhibit No. 2.

MR. HALPER: I don't think the first one was marked.

MR. BOLOTIN: That is Plaintiff's Exhibit No. 1.

(Contract and letter referred to were marked Plaintiff's Exhibits Nos. 1 and 2, respectively, for identification, and received in evidence.)

BY MR. BOLOTIN:

Q Is that the letter you referred to? A Yes. He said it wasn't his understanding that the thing had to be pumped out so often, and he was going to consult his attorneys, and that they would not be liable. So I got

hold of the copy from Mr. Barr about this time. We were an organized little group down there, to see what could be done. I got a copy of this letter which the State had prepared.

* * *

33 Q My question is this, Mr. Taylor? During
34 the times that you were experiencing this difficulty did you notice whether or not sewage was coming to the surface of the ground? A Yes.

Q Was that true on the lot owned by you? A Yes.

* * *

Q Mr. Taylor, making my question more specific, how large is your lot? A 100 by 150.

Q There are houses on either side of you, is
35 that correct? A Yes.

Q In number of feet, how far are those houses from your house? A The houses on the south are about thirty feet away, and the other side—they are both about thirty feet.

Q And then on this entire street of Washington Avenue about how many houses are there? A There are, let's see—eight.

Q Do you of your own knowledge or observation know whether Colonial or Wellington built these other houses on Washington Avenue? A That is on one side of the street, I believe—on the east side of the street. Then there are two on the west side of the street.

Q Built by Colonial? A Yes.

Q How many on your side of the street? A On our side of the street, of the houses they built, there are five.

Q Did you have occasion to notice during all this interim on the houses they built whether there was sewage seeping to the surface of the ground? A Yes.

36 Q Did you notice any such sewage? A Yes.

Q On houses built by Colonial? A Yes.

Q Can you tell the judge the names of the owners of

those houses, or identify them by street number? A Colonel Wilkins' home, the number of which I cannot give you.

Q How many doors is that from you? A That would be—let's see—six doors from me.

Q In number of feet how far is that from you? A That from me would be approximately 600 feet, I should say.

Q And you say you noticed sewage on the surface of the ground on his lot? A Yes.

Q Can you tell the Court whether you noticed it about the time that you were having this difficulty in the winter of '48 and '49? A Yes.

Q Have you noticed it recently? A Not this fall. I haven't noticed any this fall on any property built by Colonial, that is, on my particular street, because I haven't—it's all hearsay, and what I have been told. I haven't actually seen it.

Q Directly behind you are dwellings built by,
37 as far as you know, someone other than Colonial, is that correct? A Yes.

Q Did you notice whether or not there was sewage seeping to the surface on any of those houses? A Yes, there are two houses, one immediately behind me.

Q In number of feet, how many feet is that, sir? A Well, now, let's see, from my house that would be 150 feet from the front of my property line to this rear property line, my east line, and that immediately joining me on the east; there is a home where sewage flows almost constantly. It comes right out of the ground from a field. The people—which is a little north and east—that is the house adjoining the house immediately behind me—I observed this last, well, last spring, especially that that place the sewage came to the surface, and I noticed all of the trees and the grass died there. That is the place there that's owned by the Ditto family; the people behind, immediately behind me, that's owned by Watsons.

Q Mr. Taylor, while we are discussing this particular sewage, let me ask you this question: Does that sewage drainage affect your property or lot? That is, by contact or otherwise? A Well, it makes it impossible, if the wind is blowing, to go out on that side of the
 38 house, because the odor is terrific. If there is any east wind coming, you can't open your east bedroom door or window. You don't do that because of the odor coming there from that place immediately behind.

Q Does any of this sewage drain on to your property? A Well, it did, until it killed some of my hedge. It started going a little south, and it killed part of my hedge, but I stopped it off, and it goes now into a vacant lot which adjoins the people directly behind me, a narrow, vacant lot.

* * * *

William George Barr

was called as a witness for the plaintiffs, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

39 Q Mr. Barr, where do you live, sir? A I live at 383 Washington Avenue, Wellington Park Estates.

Q Where is that in relation to Mr. Taylor's home? A It is on the opposite side of the same street that Mr. Taylor lives on, about three doors north.

Q In feet that would be how much, approximately? A Probably three to four hundred feet.

Q Mr. Barr, you are familiar with the topography in a general way, are you not? A I am.

Q Your house is a little higher than Mr. Taylor's is that correct? A That is correct.

Q And the further north you go, the slope is up? A That is right.

Q And towards Mr. Taylor, which is south of you, the slope is down? A Correct.

Q Mr. Barr, from whom did you purchase your house?

A Colonial Investment Company.

40 Q Can you give us the date you made the purchase? A I entered into a purchase contract in December of '47. I can't give you the exact date.

Q Do you recall the date you moved in? A I moved in in January of '48, about the 20th of January.

Q You have heard Mr. Taylor's testimony, of course. A I have.

Q Without going into too much detail, because this is not your action, can you tell us whether or not you have experienced any difficulties similar to his with relation to your septic tank system?

* * *

42 A Yes, I did.

Q Can you tell us the date that you first apprized Colonial of that situation as far as your property is concerned? A Second day after I moved in.

Q That would be what, sir? A January 22. I am not sure whether I moved in on the 20th or the 19th. But it was two days after.

Q It would be about the 22nd or 23rd? A Correct.

Q Mr. Barr, what was the nature of your complaint to Colonial at that time? A The septic tank would not function properly in that you could not flush the toilets or use the shower or bath.

* * *

43 Q * * * Subsequent to your complaint, did anybody come out from Colonial to observe the condition? A They did.

Q Can you give us the approximate date? A That same day.

Q Was the condition corrected? A An attempt was made to correct it.

* * * *

Q Mr. Barr, did you make any complaints to Colonial about the septic tank condition from that date—that is, January 22—until March 5, 1948—additional complaints?

A Yes, I did.

Q Can you give us the approximate number of times, or approximate dates? A Well, I would say at least between that date of March 5th, at least two additional times.

Q Did anybody from Colonial come out to observe the condition? A Yes, they did.

Q Prior to March 5, '48? A Yes, they did.

* * * *

MR. HALPER: Your Honor, I am not going to ask this witness any questions, because I think that all his testimony is immaterial and irrelevant, and I move to strike it.

THE COURT: I will overrule the objection.

* * * *

46

Conley William Weston

was called as a witness by the plaintiffs, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

Q What is your employment? A Virginia State Health Department.

Q What is your specific title? A I am regional supervisor of rural sanitation for the state, Northern Region.

Q Just what does that include, in a general way? A I advise the county health departments, and also the City of Alexandria in sanitation as it relates to public

47 health. I also supervise the activities of the sanitation personnel.

Q Does that include Fairfax County, Mr. Weston? A Yes, sir.

Q Mr. Weston, are you a graduate of any college or university? A Yes, sir, Florida Southern University, Lakin, Florida.

Q What degree do you hold? A B.A.

Q Did you take any special courses in school pertaining to the work in which you are now engaged? A Yes, sir, public health and sanitation, University of North Carolina.

Q University of North Carolina? A Yes, sir.

Q What year was that? A 1936.

Q When did you first go to work for the State of Virginia? A 1936.

Q Have you been engaged continuously since that time in this type of work? A Yes, sir.

Q Mr. Weston, does that work include the problems connected with installation of septic tank systems? A Yes, sir.

48 Q From 1936 to 1948 have you had occasion to survey or study and make recommendations as to septic tank systems? A Yes, sir.

Q Many or a few? A Quite a large number. I couldn't state the number. After passing the 500 mark, or a thousand, just forget the number.

MR. BOLOTIN: I think he is qualified, Your Honor.

MR. HALPER: Qualified as to what?

MR. BOLOTIN: As a sanitation expert, particularly relating to septic tank systems.

MR. HALPER: I don't think there is a question at issue here as to sanitation. It is a question of recission.

MR. BOLOTIN: That is one of the big issues, Mr. Halper.

BY MR. BOLOTIN:

Q Mr. Weston, did you in your capacity as regional supervisor of sanitation have occasion to examine or survey recently the septic tank systems located in the Wellington Park area, including that of Mr. Taylor at 390 Washington Avenue? A Yes, sir.

Q Can you tell us, without referring to your records, when you made the examination or survey? A Not too accurately, because my memory doesn't serve me that well. I would rather refer to my records.

49 Q This is a record that you, yourself, dictated?

A That's correct, sir.

Q Will you tell us the date that you made this inspection, Mr. Weston? That is, the inspection of the septic tank systems in this area. A I started the inspections on the 27th, 28th of October, 1948.

50 Q Repeat the date, please. A 27th and 28th of October, 1948.

Q Those were the two dates? A Those were two dates that were started. It was called to the attention of the Richmond office.

Q What was the occasion for your making this inspection? A One Mr. Burnett called at the state health department and asked for assistance in an improperly-functioning septic tank.

Q What is his address? A 27 Bolling Road.

Q Can you tell us where that is with reference to Mr. Taylor's property? A I can't say definitely, but I think it is two or three streets away.

Q Mr. Weston, what is the theory or principle involved in septic tank systems? A The theory or principle is to break down the solids into fluids, as near as possible, from the sewage, and to dump it into the ground where the sub-surface follow-up, or secondary treatment, is made. And in the area that we have in question here the sub-surface soil was used as a secondary treatment, the primary treatment being the septic tank itself, or the

vault. The idea of a septic tank is, first of all, if
51 I may start with the tank itself—

Q Yes. A It's a vault of sufficient capacity to temporarily retain the sewage that goes into it. That is, the waste from the house.

Q That is all of the waste from the dwelling itself, including toilets and water? A The design calls for—the State of Virginia design calls for all of the waters used in the house, with the exception of automatic laundry machines on the order of Bendix and some more. We did not design a tank to take care of those devices. Nor is a tank designed to take care of cellar drains or storm drains. Only the waters used in the house by the residents.

To go from the septic tank, the septic tank is a temporary retention chamber where the solids are held—solids and liquids are held—for a period of approximately twenty-four hours, so that the solids will break down as much as possible, and also where, what is commonly called, bacteriological action may begin to set in, breaking down the solids as fine as possible.

Then from the septic tank, under the system that we work in in Virginia, the effluent—that is, the sewage effluent—is discharged into a distribution box. The purpose of the distribution box is to evenly distribute

52 the sewage liquids flowing into the secondary treatment, which in the case of the Wellington Parks Estate was sub-soil drainage. Then from the distribution box it goes out into the field and is there dumped into the ground. It is absorbed by the ground—partially absorbed by the ground—and also it is evaporated through the air in what may be better termed transpiration, which is where the vegetation takes off part, and the air evaporates a part of it.

One other point: It must have secondary treatment, because the septic tank itself does not kill off the harmful bacteria in the sewage.

Q Mr. Weston, you told us that you examined or surveyed the septic tank systems in the Wellington Park area, including Mr. Taylor's and those adjacent to him. Would you now tell the Court, please, the methods in which you conducted your survey, and also your findings as relates to the septic tank systems? A The method used in the Wellington Park—

MR. HALPER: Just a minute. Your Honor, I will object to the findings of this witness as of this date, October, 1948, for this reason: The theory of the plaintiffs' case of rescission deals with a definite date. That is the date the contract was entered into. And this October 1948 is nearly two years after the contract was entered into, and I think that any findings that this man makes are not material.

53 MR. BOLOTIN: It is not two years, it is only about six months. From March '48 to October '48 is two years?

MR. HALPER: Oh, I am sorry, it is nearly a year. I thought it was 1949.

MR. BOLOTIN: You stand corrected?

MR. HALPER: I stand corrected as to that, but I don't stand corrected as to this: If this man made an examination before the building started, or before the tanks were installed, I would say his testimony is material; otherwise not.

MR. BOLOTIN: I will say this, Your Honor, if Mr. Halper can show that the nature of the soil changed between March and October, he might have some ground to argue. If we can show that the soil has remained identical, not only for the six-month period, but for a long time prior or subsequent, our testimony is relevant.

THE COURT: I will overrule the objection.

BY MR. BOLOTIN:

Q Will you proceed, please, Mr. Weston? A The usual technique was followed in trying to find out what was wrong with the septic tanks in the area. There are

five or six different points that we probed into it. First of all, was the ground water table.

Q What is that, sir? A Was the ground water
54 table low enough to carry the septic tanks. Second, was the type of soil suitable. Was it porous enough for the septic tanks to function in. Third, was the area properly drained—surface-drained. In other words, ditches, and so forth, in there to drain the area.

I want to refer to my letter for another one. This is a letter I wrote.

Q Just use that, Mr. Weston, to refresh your recollection as to what you did and what you found at that time.

A The type of materials were checked into, as far as we could go.

THE COURT. Mr. Bolotin, this should have a direct bearing upon this particular property. There might be one condition as to one property, and some other condition as to another. But I suppose you will tie your report up with his.

MR. BOLOTIN: Yes, we are going to come specifically to this house and the immediate adjacent territory. That will all be developed as we go along, Your Honor.

THE WITNESS: I assisted and advised Mr. Gibson, the sanitation officer, on where to have percolation holes placed, and they were generally placed over the area. I think, to the best of my memory, there were about ten holes placed in that area. They were saturated with water, and then readings were taken afterwards, or attempted.

BY MR. BOLOTIN:

Q Mr. Weston, in line with the Judge's sugges-
55 tion, in making these ten holes can you tell us whether or not any one or more were made on Mr. Taylor's property? A I don't recall whether any one of them was made on Mr. Taylor's property. I rather doubt there being any made at that time on Mr. Taylor's property. However, Mr. Taylor's property is one of the

twenty-eight that we were surveying. We certainly, so far as the percolation hole is concerned, I don't think that it matters in that soil over there, because it was the soil that we found, that was what we were after, to test the porosity of the soil. By putting those holes down we were able to find that there was a hardpan there.

By a hard-pan I mean soil that would not absorb water. We also found that when we sunk the holes 24 inches, that in some of them—I do not recall the exact number—in some of them the ground water table rose up to within twelve inches of the top of the ground.

That covers the point of investigating the ground. We then started investigating the way in which the septic tanks were installed.

Q Mr. Weston, on that point I think you should confine your findings only to Mr. Taylor's septic tank installation. A Mr. Taylor's septic tank is between three and six feet under the ground, because that is what
56 all of them ran, between three and six feet. We do not recommend any septic tanks be put that deep in the ground, because they get out of the area of what may be commonly called top soil or zone of aeration, where a favorable absorption takes place.

Q That is, out of the area where favorable absorption takes place? A That is right, it is beneath the area.

Q About how far below the surface should a tank be installed? A Around two feet. That is, the flow-line of the tank, not the tank itself. A tank has quite a bit of depth to it. After all, it is water-tight. It probably goes down six feet in the ground, but the flow line, the sewage effluent line, two feet.

Q Would you explain that, sir, what you mean by a flow line? A The septic tank is constructed with an inlet and an outlet. At the inlet end of the tank the house sewer line is connected. The sewage flows into the tank through that inlet. Then out of the tank at the effluent end or the outlet end. The depth of the tank is approxi-

mately five feet, one foot being allowed for air space, four feet for liquid space.

Q Could you be good enough to put it on a chart?

A Surely. (At blackboard) This is the septic tank right here, distribution box, and here are your drain lines.

57 THE COURT: Where is the inlet?

THE WITNESS: Here is the inlet, and here is the outlet. That is the top of the tank. That is a one-foot space up here.

THE COURT: Are the inlet and outlet—

THE WITNESS: On the same level, or perhaps an inch variation between the two. This system depends upon gravity flow, to work, flowing by gravity from the house to the septic tank to the distribution box.

BY MR. BOLOTIN:

Q Is this demonstration on the board a normally-installed example, or is this Mr. Taylor's septic tank?

A This is the conventional design of septic tank. So far as the tank is concerned, Mr. Taylor's tank, without a shadow of doubt, is a conventional tank. It is rectangular in shape.

Q Does Mr. Taylor's tank system have a distribution box, do you remember? A I do not think so, because I think there were only one or two in the area that had distribution boxes. I think that his system—we have a permit here. I would rather refer to that permit that you have. That shows the type of system that was designed.

Q You can use this to refresh your recollection,
58 Mr. Weston. A This shows no distribution box—the system installed at Mr. Taylor's—but it runs straight into a series of "Ts" coming down and connecting together in that manner with the drain tiles over here (indicating). This is a tight line running out to these "Ts."

Q That is the outlet? A That's right. This is what is called a purification field.

Q Using this tank which you have drawn, can you point out to the Court, Mr. Weston, in what respects Mr. Taylor's system was not properly installed or constructed?

A Instead of this field being in the ground within the aeration zone of where the transpiration and so forth would exist, it is down where the ground water table can flow in, or it was at that time. I don't know whether it has been changed since or not. I don't know. Being three to six feet down in the ground, it gets down below that portion of the ground which takes in air and gives off air. The design of the system would have very little bit to do with its working if it were built properly.

Q Why is that? A Because, to get the drain lines out there, they would probably work anyway if they were in a zone of aeration where they could work.

Q Mr. Weston, will you tell the Court what you
59 found by way of the soil and other conditions which have an effect, or whether or not the tank can work properly, coming specifically now to the tank as installed on Mr. Taylor's lot? A I think I have stated that already in this question right here.

Q You mentioned, I think, that you found hard-pan. I would like to get from you a better description of what you meant by all that, sir, just how it affects the whole system. A In speaking of soils, so far as we know it, in septic tank construction, it goes from one extreme to the other. It is either too fine or it is too coarse. To be a good filter, of course, it has to take the water satisfactorily. By that I mean this, that when you run a percolation test in the soil, you can expect water to fall at least one inch per hour. When it is too dense, it won't do that.

In speaking of the hard-pan, I think geologists would call it—I am not a geologist, don't misunderstand me—

I think they would call it the beginning of the formation of rock.

Q You are now talking about the soil on Mr. Taylor's ground? A Yes, sir.

Q What effect does that type of soil have on the workability of the septic tank system? A Well, it will
60 not absorb; the water can't get through it to any degree of rapidity.

Q What steps do you go through to make this percolation test you just mentioned? A Dig a hole 12 inches square to the depth of the line that you are going to put the field in.

MR. HALPER: He hasn't stated what he does. He just gets the dirt, but I don't know what he does with the dirt.

THE WITNESS: We pile it on the side.

MR. HALPER: I mean the test you put the dirt through.

THE WITNESS: The hole is used, the hole is saturated with water, and a period of about twelve hours should elapse before water is again poured into the hole, and then the readings are taken as to how fast the water falls into the ground.

BY MR. BOLOTIN:

Q And you did all this in those two days? A Yes. That was done in that area where the 28 holes were giving trouble.

Q What was your finding as a result of this test?

MR. HALPER: Of course, Your Honor, I don't want to object each moment. I think Your Honor has overruled the objection generally. The general objection to this man's testimony is the date when these tests were made. In other words, if they were made before the
buildings started, there might be some pertinence,
61 but I maintain, having been made at this late date, they do not, they are not material to his case, to the theory of his case.

THE COURT: I think there is nothing to show that it was any different in the beginning from what it is now. I mean, from the beginning there was this difficulty about the septic tank. Apparently the defendant had some knowledge of the non-workability of septic tanks.

MR. HALPER: But not knowledge that the non-workability was due to the lack of porosity of the soil as disclosed by the tests the man made subsequently. That is my point.

MR. BOLOTIN: Of course, the answer is simply this, it would have been just as easy for you to have made the test before you put the tank in to determine that it wasn't going to work, as it was in October.

MR. HALPER: You mean my client.

MR. BOLOTIN. Your client. That is the answer. We are going to show that up to yesterday the tests still indicated that the soil was bad. That is just a question of continuity there.

BY MR. BOLOTIN:

Q I think you finished your answer. A I did. Now may I proceed on the next method we pursue?

Q Yes. A Try to find out what types of materials were in the fields. I am speaking now of aggregate to spill the sewage on. We found that unscreened cinder had been used in the base of some of the fields, unscreened cinder, mine-run cinder, too fine. That is, loaded with too much fine substance. In this particular field of Mr. Taylor's, I do not know whether it applies to his or not, but I know it applied generally to the twenty-eight. By too fine I mean that the mesh was of less than one-quarter inch in diameter.

MR. HALPER: Did you say mesh?

THE WITNESS: M-e-s-h.

MR. HALPER: Of the cinder screen?

THE WITNESS: Yes, sir, of the cinders—no screen to it.

MR. HALPER: I mean, the cinders were used for screening purposes.

THE WITNESS: They were less than one-fourth inch in diameter.

BY MR. BOLOTIN:

Q What is the effect of that? A The effect of it is there is no base to drop the sewage effluent onto to hold it up so that it could find its way into the soil. The cinder has a tendency when it is too fine, to cement over when sewage flows onto it, over a length of time, if it is too fine. It also gets into the lines and chokes up the lines.

63 Q Coming to the health aspect of this situation, do you recall whether or not you noticed any sewage coming to the surface of Mr. Taylor's lot? A Mr. Taylor's lot had been, the way the record shows, must have been one of those twenty-three that had been repaired with a dry well filled with rock.

Q Was this repair something that is of a permanent nature, or a temporary nature? A It could not be permanent unless the hole was deep enough to completely puncture the impervious strata of soil. In other words, in that area there the clay was found to run from about 20 to 30 feet deep into the ground. To become effective in that type of soil, they would have to puncture completely through that hard clay and get into the sand strata underneath, or to get into the underground water table. That is, the drinking-water table, down into the shallow drinking-water table. I think that was attempted in all twenty-three cases; as to whether or not they got down to that point I don't know.

Q Did you notice any sewage on the surface of the ground during your visit out there, Mr. Weston? A Yes, sir, in five cases. I have stated in this report that five of the twenty-eight were spilling on top of the ground.

Q Do you recall the proximity of those cases to
 64 Mr. Taylor's residence? A There were some on
 the same street that Mr. Taylor resides on, and on
 a street below—Greenway. Is there such a street there
 as Greenway? The road below, down the contour from
 where Mr. Taylor resides has sewage, I observed this
 morning, still spilling into the storm sewer.

Q As of this morning? A Yes, sir.

MR. HALPER: Whose property is that?

THE WITNESS: It's at the dead-end portion of
 Greenway Street. Greenway Street is a dead-end street.

MR. HALPER: I object to that, Your Honor, that has
 nothing to do with Mr. Taylor's property. I move that
 that be stricken.

MR. BOLOTIN: That is the next question: What
 effect does this sewage on the surface of the ground have
 upon Mr. Taylor's property, if any?

THE COURT: I will sustain the objection, because
 there is nothing here to indicate that the defendants are
 responsible for this condition; I mean the particular
 property that overflows.

MR. BOLOTIN: Well, in this one respect, Your Honor.
 We will show conclusively that the defendants knew of
 this general insanitary condition, which is very harmful
 to a person's health. Knowing that, they deliber-

65 ately concealed the information when they got the

Taylors to sign the contract. I want to show by
 this witness that when sewage spills or comes to the sur-
 face on Mr. X's property, it is no reason why Mr. Tay-
 lor or Mr. Y won't be affected, because the whole area is
 affected by the insanitary condition. Germs and infec-
 tions are not limited by boundaries and lots. Germs and
 infections spread. Those are the conditions that we have
 that this man observed. I want to find out just to what
 extent he observed that.

THE COURT: But you are dealing here with one
 specific property.

MR. BOLOTIN: Mr. Weston inspected twenty-eight. He found twenty-eight houses out of forty had insanitary conditions.

BY MR. BOLOTIN:

Q Mr. Weston, do you know, or were you told, whether or not all twenty-eight houses were constructed by the same defendants? A I don't know whether all twenty-eight of them were constructed by them, but all twenty-eight of them were the property at that time of the Colonial Investment Company, because I talked with Mr. Badt, who was the head kingpin of the organization out there—the head or kingpin, or whatever you want to call it.

Q Do you recall at this date whether or not
66 there was this condition of sewage on the surface on Mr. Taylor's street where Colonial had done some construction? A Yes, sir, there were at least one or two cases on that street flowing on the ground.

Q Did you make any recommendations, Mr. Weston, either to the county or to any individual or corporation as a result of your investigation and findings? A Yes.

MR. HALPER: I object to that, Your Honor. This man is testifying as to facts, so far, but now he is testifying as to recommendations, some opinion of his or direction which has nothing to do with this case; especially, he makes this recommendation at a late date. He has already testified as to a condition. I don't see how his recommendation is going to help the situation.

MR. BOLOTIN: I will say this, if the Court pleases, we ask that question for this reason, to show that the information or knowledge of the condition was brought home to the defendants to show that they were given ample opportunity to correct the condition, to show that they did not correct the condition. That is the question I asked.

THE COURT: You made it much broader than that—did he make any recommendation. You didn't say to whom.

BY MR. BOLOTIN:

Q Do you know whether the recommendation
67 was brought to the attention of Colonial or Wellington Park Corporation? A Yes, in Dr. Bradford's office, to Commodore Badt, in my presence.

Q Who is Commodore Badt, sir? A He was the representative of the Wellington Park Estates, or he represented himself as being a representative, in my presence.

MR. HALPER: There is no question that he is, and I think for the purpose of the record you ought to state who Dr. Bradford is.

THE WITNESS: Dr. Bradford is the health officer of Fairfax County.

THE COURT: Who was this man that represented the defendant company?

MR. BOLOTIN: Mr. Badt, Commodore Badt, B-a-d-t.

MR. HALPER: There is no question, Your Honor, that he is a representative of the defendant. There is no point made of that.

BY MR. BOLOTIN:

Q Did I understand you to say that representation was made by him in your presence? A In my presence. It is contained in this letter right here to Dr. Bradford, the health officer of Fairfax County.

68 Q Can you tell us— A May I read it?

Q Do you have to read it verbatim to refresh your recollection? A I'd prefer to read it. It has my name on it.

MR. HALPER: In the first place, Your Honor,—what is the date of the letter?

THE WITNESS: The 17th day of December, 1948.

MR. HALPER: That is about nine months after this contract. I can make a recommendation, too. I can do a lot of things there, but is that pertinent to our issue as to whether this man has a right to rescind a contract? There are usual grounds for rescinding a contract, Your

Honor, and those grounds exist at the time the contract is entered into, even if it is concealment. The discovery of the matter concealed may take place at a later date. That is another thing. That isn't what this man is testifying to at all. He is testifying to a condition that existed, or that he found some time later, and a recommendation he made.

THE COURT: But this plaintiff has testified what the condition was when he went into this house, and apparently this, from all that I have heard thus far, seems to be a continuing condition, whatever it was.

MR. HALPER: I am only directing my objection to the recommendation. He has already testified as to the condition.

THE COURT: As I understood it, what the
69 witness was asked about was some recommendations made in the presence of certain persons, a representative of the defendant company and the health officer.

THE WITNESS: That is correct.

THE COURT: You ask him, and let him tell about it, if that is what you are asking.

MR. BOLOTIN: That is correct.

BY MR. BOLOTIN:

Q Would you answer the question, Mr. Weston—the recommendations made to this Commander Badt in your presence. A Here are the recommendations that were made:

“That all of the homes in this area be served by a public or private sewer connected to an approved sewerage treatment plant.

“The septic tank purification trenches serving the homes cannot be repaired or extended because of the following factors:

“(a) The soil is unsuitable for purification beds with its tight composition and a high underground water table.

“(b) The homes already have been constructed on

lots improperly drained from surface water and without previous thought to lowering of the underground water table in preparation for purification beds located in unfavorable soil conditions.

70 "All of the homes are equipped with radiant heat placed in the ground level floors of about two-feet thickness. The house sewer lines lie under the floors and about 2.5 feet under the ground. These factors were primarily responsible for the septic tank and purification trenches being placed from three to five feet under the ground and within the underground water table.

"Any attempt to provide these homes with properly-functioning septic tank purification trenches would necessitate remodeling the house plumbing systems, raising the sewer lines, lowering the underground water table, and providing new septic tank installations for all of the homes where improper functioning has occurred." That is the end. That is signed by C. W. Weston.

Q That is yourself? A That's right.

MR. BOLOTIN: No further questions.

Cross Examination

BY MR. HALPER:

Q Mr. Weston, what is the authority of the Virginia health department over an installation of this kind before the installation has commenced? A We have no state sewage laws, sir, covering individual septic tank construction, no state laws. We rely upon the county laws to cover it, county and ordinances.

71 Q If in a given community in the State of Virginia a prospective or proposed building is built in compliance with the county laws, then your department is satisfied, is that it? A If the systems are put in according to our state standards.

Q According to what? A According to our state standards.

Q What is the requirement that county officers pursue that state standard? A Right there, sir, that is the septic tank bulletin put out by the health department.

MR. BOLOTIN: Would you read the title.

THE WITNESS: It is called "Septic Tanks for Suburban and Country Homes," issued in 1947, Virginia State Department of Health, Richmond, Virginia.

BY MR. HALPER:

Q Mr. Weston, is that directory or mandatory, or is it merely a suggestion to the county health authorities?

A We pay 75 per cent of their salaries, sir, and I think with that statement that you can figure it out. In other words, we are going to see that the state standards are kept. That is a part of my job.

Q That is a part of your job? A Yes, sir, to see that minimum standards, that the state recommendations are followed.

Q In making this investigation you found that these standards were not followed? A That is correct.

Q Who do you charge with that deficiency?

MR. BOLOTIN: Just a minute. That is going a little too far. Assuming that one or more county officials erred in judgment, or otherwise, I don't think that the defendants can take advantage of that error. That is Hornbook law. If the county officials erred, or used bad judgment, that doesn't absolve a builder of negligence and liability.

MR. HALPER: But, Mr. Bolotin, this is not my witness. I am cross examining. That question doesn't go to establish any fact. I am cross examining this witness.

MR. BOLOTIN: The question you asked would show culpability on the part of some county official.

THE COURT: Let's see what the question is.

(The pending question was read.)

THE COURT: It seems to me it has not been brought out whether the county standards were followed or not.

MR. HALPER: This is cross examination, Your Honor. I am trying to test this witness' statement. He insists that these installations were not according to standard. Then he says that the county health officers are supposed to follow that standard. Now my next
73 logical question is, who failed to follow, did the Virginia State institution fail to supervise it, or did the county health officers fail. I think it is proper cross examination to test this man's statement.

MR. BOLOTIN: Ordinarily the question would not be objectionable, Your Honor, but assuming the man says yes, the county officials are chargeable with this default, it still doesn't absolve your clients.

MR. HALPER: That isn't the point. I am not establishing any fact. I am cross examining this man. I am testing his statement.

MR. BOLOTIN: I will withdraw my objection.

THE WITNESS: We considered it an error of judgment.

BY MR. HALPER:

Q On the part of whom? A On the part of the man who did the work.

Q That is, on the part of the builder? A So far as the inspection of it, sir, the sanitary inspector that inspected him.

Q I am afraid I don't get you. A We considered the inspection work an error in judgment so far as the county health department was concerned. That was the question you asked me, wasn't it?

Q Yes, I asked you who was at fault. As a matter of fact, if the county health officers passed this installation and issued the necessary permits, the only logical
74 conclusion, or the only conclusion that can be drawn from that is that they were in default in their inspection, or you are not properly stating the case, isn't that right? A No, sir, I disagree with you, because you could have deposited soil on top of those tanks

after they were installed. In other words, your own concern could have done damage to them by putting—you see, there are three to six feet of soil on top of those tanks out there. They have the approval of the county health department there, it's quite true, but they probably were approved when, maybe, there wasn't but two and a half or four feet of soil. They could have been damaged more after they were put in.

Q Could have been damaged by the occupants? A Yes, by the grading that was done out there subsequent to the installations.

Q And could have been done by the occupants, too?

A Why, certainly, could have been, certainly.

Q Mr. Weston, will you draw that hard-pan line. That is a cross section, isn't it? A I will try to show it to you, if I can. (At blackboard.)

Q Isn't that a cross section of your septic tank? A No, I haven't got that in there. Tell me what you mean by drawing the hard-pan now.

Q You said there is sub-soil that is porous to a
75 certain distance. A That we didn't find out there, sir; when we dug down we found there were only about six inches of soil that was porous.

Q From the surface? A That's right.

Q Where did you meet the hard-pan? A We met the hard-pan about six inches under the top of the soil.

Q Draw that line. Wouldn't that line be six inches below the surface? A About in here, but this is only a diagram of a functioning septic tank, that is not the septic tank that is out there.

MR. BOLOTIN: You want the condition as he found it?

MR. HALPER: Yes.

THE WITNESS: These lines represent the hard-pan or impervious soil—20 to 30 feet, at least. Some of them were able to puncture it in certain places. That is your hard-pan, that is your impervious soil.

BY MR. HALPER:

Q That is, water will not percolate through that? A To any degree of rapidity sufficient for the septic tank to function.

Q Didn't you say in your direct examination
76 that it wouldn't go through at all? Didn't you say it was merely clay? A That is correct.

Q Wouldn't the water gather, then, on that hard-pan and form a lake under the ground? A That is exactly what you have in water systems. If you want me to, I will draw you the usual water table.

Q I want to find out where you found that hard-pan. A Right in here, six inches under the top of the soil.

Q What happened to the water when it hit that hard-pan? A The little amount that hit there stayed in there, just seeped in there, slowly and gradually, would not take any more water.

Q What did you find at the bottom of the tank, what kind of soil, under the tank? A Hard-pan.

Q All the way through? A All the way down, yes, sir.

Q And you say when you dug the hole to get the percolation test the water did flow out of the hole? A Flowed into the hole. Your name—

Q Halper, H-A-L-P-E-R. A Flowed into the hole, seeped very slowly into the holes.

77 Q The hole you dug for test? A That's what I answered, right into the holes, very slowly, filled within 12 inches of the top of the ground in some cases.

Q Where were you when these houses were built? You and your department? A I don't know when these houses were built.

Q Where were you at the time so far as making any inspections are concerned? Where was your Virginia State Sanitation Commission at the time these houses were built? A We were on the job.

Q You were on the job? A Yes, sir.

Q You weren't on this job. A No, we don't try to make every job, Mr. Halper, we can't. We have to rely upon the county personnel.

Q What would you say about an owner or a builder who obtained a permit from the county authorities and prosecuted the building of these septic tanks by periodical examinations as the work progressed; would you say that that builder was in default, or not? A Would you mind restating your question?

Q What I mean is this. What would you say of a builder who went to the county health authorities and obtained the permit to install these septic tanks, 78 and also had the necessary supervision and inspection by the authorities as the work progressed; would you say he was in default in putting in a septic tank of this type? A If he knew the soil was bad, yes, sir, I think there is a moral responsibility.

Q If he didn't know anything about it, you wouldn't charge him with any default?

MR. BOLOTIN: That is, if the inspector didn't know about it, is that right?

MR. HALPER: Mr. Bolotin, please let me cross examine this man; he has answered very intelligently.

BY MR. HALPER:

Q You stated that the State of Virginia design—this is not the State of Virginia design, is it? This is not the design prescribed by your department, is it, according to that pamphlet you have? A Yes, the tank is; the distribution field is not.

Q I see. And then you did say, though, I think, it does not take care of a Bendix. You mean by that a washer. A Yes, sir, any machine that uses an excessive amount of water.

Q And what other conditions doesn't it take care of? A Storm drains, cellar drains.

Q Do you know where the surface waters go in
79 that property? A They go into a storm drain,
Mr. Halper, that cuts across Washington Street. I
think that's where Mr. Taylor is.

Q Out on the curb, is it? Do you mean a hidden
drain? A Yes, a covered drain, yes, sir. There is a
covered drain under Washington Street, and then it flows
down to the next street, and I think parallels the next
street and flows out to a dead end.

Q In any event, the surface waters don't enter this
sewer system. You said, also, cellar waters, did you
not? A Cellar drains.

Q It doesn't take care of cellar drains? A No, sir.

Q There is no cellar in this house, is there? A No,
sir.

Q So there is no necessity for cellar drains. A I
don't think so. I have never been in any.

Q Your system, if properly installed, and so forth,
would that take care of excessive use of water? A These
things are designed to care for families, allowing about
50 to 60 gallons of water per person per day.

Q How many people would use that much water per
day? A Well, in reading your papers today I think
you will find that in New York City they are charged
with using an excess amount, 110 gallons, but we
80 consider about 50 gallons as being a normal amount
for a person to use during a day.

Q That, of course, takes care of all the sanitary
waters. A That's correct—showers, washing dishes, and
so forth and so on, everything except laundry machines,
and so on.

Q What do you do with the cleaning? Is there a
cleaning of septic tanks? Is there a process of cleaning
that is required under your system? A Yes, sir. These
tanks are designed to function for about five years, and
then they should be cleaned on an average of about once

every five years. It depends upon the load going into them, more or less.

Q And an excessive use of water— A The excessive use of water would have very little to do with the cleaning of the thing; it is the actual solids that come, the waste of the body, that build up in there. The liquid that goes in there would flow on out into the ground.

Q This discharging of sewage on the surface, that might be caused by water, an excess of water? A You are quite right. If the plumbing is not right, and so forth, the water continues to flow into the tank, and it is going to go somewhere.

Q Of course, you know the topography, do you
81 not, the contour of the land; you have noticed that in your inspection? A Yes, sir, I think so.

Q Do you know how far it is from the Potomac River?
A No, I don't.

Q Do you make it your business to ascertain the distance from the Potomac River? A I had no reason to.

Q Would you say that these installations, such as you find them, and according to your prescribed formula, would you say that they would work normally in seasons of heavy rainfall, or not? A You have asked a good question there, sir. I think that if put in properly, and so forth, there might be a small amount of trouble from one, if the rain was, rainy season would last too long, if there was too much snow covering, and so forth. Snow would have a greater effect on it than rain.

Q Your theory of a septic tank and the distribution fields that lead out of a septic tank is that the soil must not only be of sufficient porosity to absorb the water but also to be dry? A Not necessarily, sir.

Q Not too wet, let's put it that way. A That is correct.

82 Q So that if a heavy rainfall or an extended rainfall, rainy season came along, it would disturb that relationship so that the function would be improper,

is that right? A Well, I think it would take a Houdini to answer that. Just exactly what do you mean?

Q For instance, assuming that these distribution fields were properly laid, and assuming that the soil was proper, would you have the same type of function in dry weather as you would in wet? A You wouldn't have the same type of function, but you would have sanitary conditions most always. You might have one per cent flaring up, but you wouldn't have 28 cases out of 40 flaring up. In other words, you wouldn't have 60 per cent of your installations bad. Do you get what I mean?

Q Yes, but you are referring to numbers. Take one case. A May I give you an example which will answer you?

Q Yes, I want an answer. A Down in the Newport News area, Norfolk area, we have put in hundreds of them during the war, and we have had less than one half of one per cent trouble on account of weather conditions, and so forth, if that answers your question—excessive rains, and so forth.

Q When was that? A From 1941 and '42 on
83 through 1945 and '46. That's when they were put in down there, sir.

Q Not 1948. Mr. Weston, you didn't make any percolation tests on the Taylor property, did you? A No, sir, I don't think so.

Q I think you stated at what interval you made this hole. What was that? A That we took the percolation test?

Q Yes. You dug a hole, at what interval? A We went to a depth of 24 inches, that's as deep as we dug.

Q How far away were the holes from each other? A I don't remember. I think that we pretty well represented that area up there.

Q You don't remember? A I don't know how close together, no, sir.

Q You also stated that the tank was three feet below the ground, didn't you say that? A I said these tanks were three to six feet under the ground. The flow line shouldn't go more than 24 inches—around 24 inches—underground.

Q They were too deep? A Too deep, yes, sir.

Q That inlet pipe, how many inches is that below the ground? A I think this will help answer your
84 question. This inlet pipe ought not to be more than 24 inches under the ground.

Q And the flow line— A Is this line right here (indicating).

Q Is to coincide with that inlet? A Yes.

Q What did you find in these cases they were? A Three to six feet under.

Q The inlet, too? A Yes, sir.

Q Mr. Weston, is that one of the elements or factors that the county authorities should examine before they give a permit? A I think two things could happen there; one is that they could have been put that deep in the ground at the time, right at the time they were installed.

Q How deep? A Three to six feet in the ground. The other is that they could have had dirt moved in on them subsequent to their installation and approval. I don't know which occurred. I wasn't there.

Q The sewer line, you found in your report, runs so many feet below the level of the floor. I think you stated that in your recommendation, didn't you? A Yes, sir.

85 Q And then it has a fall or a pitch to the tank, does it not? A That's right.

Q Can't you tell from that whether it was covered up later or not? A No, I wouldn't have any way to know at what time they were covered up, because a lot of grading was done around in that area.

Q In digging these dry wells, I suppose what you mean is that another tank smaller than that is dug adjoining and filled with gravel or cinders; where would a dry well attach there, a second dry well? A (At blackboard) These systems do not have, as we stated, four distribution boxes. They have a bunch of "Ts". Off at some point from the distribution field a hole about three to six feet in diameter was dug into the ground with the purpose in mind of puncturing this thing right here, Mr. Halper, the hard-pan, get through that and down into the underground water table, or down in the pervious layer where the underground water table usually lies. We recommended that that practice stop, because it is bad public health practice. It pollutes the underground water table, and with time it would cause trouble to any one having—or would be a potential cause of trouble to anybody having—a shallow well in that neighborhood. That is

86 why we recommended that this practice stop.

Q You have gone off my question. Where would the third dry well be? A I don't know how many dry wells were finally put in there.

Q This man said he had three. A Anywhere in here, I presume, somewhere in here. I know generally where those dry wells are, but only generally.

Q They would have a tendency to draw off the excess water from the distribution field, would they not? A If they were successful in doing this, Mr. Halper, getting through this thing right here (indicating hard-pan). Otherwise, there isn't much they would do except to become water-logged like the field does.

Q I don't know whether I asked this: You didn't make any inspection in 1946 or '47? A No, sir.

Q The first time you visited the ground was in December—or October 27 and 28, 1948? A I believe October, 1948.

Q That was the first time you visited the property? A Yes, sir.

Q And as far as you know, and as far as your department knows, no one else made any test? A I could not state, sir.

87 MR. HALPER: All right, that is all.

Redirect Examination

BY MR. BOLOTIN:

Q How far below the ground surface did you say the hard-pan started? A In most all cases around six inches below—

MR. HALPER: Mr. Weston, would Mr. Taylor, if he wanted to set out a fairly large bush, have to dig into hard-pan to do it?

THE WITNESS: He certainly would, I think, because I think we took a representation of that soil there.

BY MR. BOLOTIN:

Q Would it have been a very difficult task, or a simple task for a person to have discovered this condition of the hard-pan before construction was started—say, 1947—in your opinion, Mr. Weston? A I shouldn't think it would be any trouble.

Q You had no trouble, is that correct? A No, sir.

Q So that if anyone wanted to conduct a test to determine the suitability of the soil, it could have been done very easily? A Yes, sir.

Q Mr. Halper asked you a question about periodic inspections being made during construction of the
88 dwellings. Would the fact that the septic tanks were not in use during that period of construction, as compared to their being used subsequent to being lived in, have any effect upon noticeability of the tank system to the inspector? A Yes, I would think so, because some inspectors in going through, they watch a house to see if it is occupied. Because, after all, you can have anything, as far as that goes, until you occupy it in the way of a residence. It's not considered a public health problem.

It wouldn't be a public health problem until they moved in.

Q Coming to the soil itself, Mr. Weston, you told us that you examined, I think, forty houses in this entire area. Was the soil that you found in the entire area of a similar or like quality? A Yes, sir. In fact, the soil in that area runs all the way across number 1 highway. The Groveton area is an area very similar to that, too—hard-pan area.

Q Is it your answer, then, that the soil on Mr. Taylor's land is the same as all the adjacent land around there—hard-pan area? A Yes, sir, I should think that would be true.

Q In your opinion is it likely that there was any change in the nature of the soil for the year preceding October 1948? A Not to any great degree, I shouldn't think.

89 Q Did you follow my question? A Not any degree of change; I couldn't see how it could be.

MR. BOLOTIN: No further questions.

Recross Examination

BY MR. HALPER:

Q Mr. Weston, you spoke of the Groveton area. Do you happen to know how many houses in that vicinity, in that immediate vicinity, contiguous to each other, are served by septic tanks—approximately? A No, I wouldn't hazard a guess.

Q Well, would there be a hundred, or two hundred? A I don't know.

Q There are a number of them? A Yes, I am sure there are a number, but I don't know how many.

Q Another thing: Does a septic tank act and function exactly like a sewer system or not? I mean, a good septic tank such as you prescribe in following your standard design and all, would that act exactly, function exactly as a sewage system? A No, sir, it wouldn't.

Q You expect a septic tank not to give you the 100 per cent service that the sewage gives you, is that right?

A Why, of course, that's quite true.

* * * *

90

Victor R. Taylor

resumed the stand, and having been previously duly sworn, was examined and testified further as follows:

* * * *

Q Mr. Taylor, I think you identified Plaintiff's Exhibit No. 2, which is a letter you received, is that correct? A Yes.

Q And can you tell us when you received that letter—whether you received that letter? A Yes, I did.

Q About when did you receive it? A I think I received it probably that day or the next day; that is, January the 5th, 1949, that afternoon or the next day.

Q And this letter is as follows. It is on the Wellington Park Estates stationery, dated January 5—
91 it is typed 1948, however there is a pencil delineation of the "8" and the pencil notation of the "9". I assume 1949 is correct.

MR. HALPER: I don't know, but I won't make a point of it. I think it is probably meant for '49.

BY MR. BOLOTIN:

Q It is addressed to Mr. Victor R. Taylor, 390 Washington Avenue, Wellington Park Estates, Route 1, Alexandria, Virginia.

"Dear Mr. Taylor:

"There has been presented to us for payment by the Odorless Septic Service three bills, each in the sum of \$35, dated December 19, December 24, and January 1, respectively.

"I was very much surprised in our telephone conversation of a day or two ago to learn that you were having the septic tank pumped weekly, which was not in accord-

ance with any understanding that you and I had. We did authorize the payment for the pumping of your septic tank some several weeks ago due to an emergency, as we understood it, but we never knew that you were ordering this work done weekly.

"Since there may have been a misunderstanding between you and me, I am authorizing these bills paid. But this is to advise you that we will not pay any further bills incurred by you in connection with your septic
92 tank. We have placed the matter of the septic tanks in the Wellington Park Estates in the hands of our attorney, Mr. Kendrick of Jesse Phillips, Klinge & Kendrick, of Arlington, Virginia, and are awaiting his advice in connection with this situation. Until we hear from him, we regret that we cannot advise you further.

"Very truly yours, Wellington Park Estates, Inc., by Nathaniel J. Taube, President."

Mr. Taylor, my question is this: Up until the time you received this letter on about January 6, had you been negotiating with this defendant to make a permanent correction to a septic tank system? A Yes, I had.

Q And I think you told us that they made several attempts to correct it and many things were done in an effort to correct it? A They said they were doing everything possible, they wanted to correct the situation. They said that they had contacted the department of health, and I believe I testified this morning, during the conversation with Mr. Taube on the day before this was written he said that he had seen a report from the department of health of the State of Virginia, and that the recommendation for the correction was ridiculous. Those
were the words he used.

93 Q Mr. Taylor, up until today has anything been done by anyone to make any permanent correction to this system? A No.

Q Mr. Taylor, up until you received this letter on January 6, 1949, was anything said to you, or indicated

to you by either defendant that they had no intention of not correcting the condition permanently? A No, on the contrary, they kept leading me to believe that they were doing their best, they were going out of their way, they wanted to do everything possible to correct the situation.

Q Did you make any effort after January 6, 1949, to again complain to the defendant about the septic tank system? That is, prior to the filing of suit? A No, I did not. After I received that letter, I figured then that was about the end; after having all of the numerous telephone calls, the number I cannot remember, and all of the trouble, I figured that this letter just showed that there was no good faith, that they had no intention—when he said he was going to talk to his attorney, whatever the letter said there, the phraseology, I felt, well, there was just no use going on any further, because I had to pay for this every time the thing would fill up. We'd have to have it done, we didn't want it
94 spilling all over the ground, and it was breaking
me. I had to do something. So I immediately
came to you and told you the problem, and that was that.

Q Mr. Taylor, did there come a time when you learned of the reason that the septic tank wasn't functioning properly, as described by the previous witness? A Yes, I learned that; Mr. Barr, who testified this morning, showed me a copy of that letter. We were, quite a number of us were incensed about the situation in the neighborhood, and we got together, and we had a little organization. We wanted to try, if we couldn't do it individually, thought collectively something could be done. I saw a photostatic copy of that letter signed by Mr. Weston, and I figured, here is a man who is an expert, if it can't be remedied, that's that.

Q What month was it that you learned about this

condition? A I think that was about the time in January—January, 1949, just before I came to you.

Q Mr. Taylor, did you or did you not know prior to January, 1949, that the soil and other conditions then prevailing in your property did not lend themselves to a properly functioning septic tank system? A No. If I had known that, I certainly wouldn't have bought a house.

* * * *

95 Q Mr. Taylor, what if anything did Mr. Lewis tell you about the composition of the soil as it pertains to septic tank functioning? A He didn't say anything about the soil, he just said the system would work, and it would go from three to five years with no trouble. If I had known anything else I certainly wouldn't have purchased the place.

* * * *

96 Q Did Mr. Lewis say anything to you about any trouble that the area was having with septic tank systems? A Definitely not. Had he done that, I certainly wouldn't have signed the contract. That is perfectly obvious.

* * * *

99 *Victor R. Taylor*

resumed the stand, and having previously been duly sworn, was examined and testified further as follows:

* * * *

BY MR. BOLOTIN:

Q Mr. Taylor, when we adjourned last night, we were discussing certain costs and expenditures which had been made on this property. I am going to read into the record, with your help, those items which Mr. Halper has agreed upon.

Mr. Halper, will you note these items down, and if you have any question, will you raise it?

MR. HALPER: All right.

MR. BOLOTIN: The first item is five hundred dollar deposit, March fifth, 1948. We have a cancelled check for that.

Second item is five hundred dollar additional deposit on March 12, 1948. I give the dates, if the Court pleases, for the purpose of computing interest.

And the third item is four hundred fifty dollars on March 12, '48, for extras.

MR. HALPER: Paid to whom?

MR. BOLOTIN: Paid to Colonial Investment.

100 THE WITNESS: Just a moment. You can show to Mr. Halper just exactly what that is for, a receipt.

(The receipt was handed to Mr. Halper.)

MR. HALPER. I will admit that that amount was paid, and that it was paid for the items shown in the receipt.

MR. BOLOTIN: Your Honor has up to this point, I think, three items: five hundred, five hundred, and four hundred fifty.

BY MR. BOLOTIN:

Q The next item is also dated March 12, 1948, and was a check given to the title company, which included various items which I assume you will concede. A I think that is the twenty-sixth. I beg your pardon. That is the settlement date.

MR. HALPER: March 26.

THE WITNESS: It is March the twenty-sixth. There is a list there which gives that.

MR. BOLOTIN: The amount of that item is \$2784.78. The next item is \$70.18 for taxes.

* * * *

101 Q Will you read, please, the next items, Mr Taylor? A There is payments to Kelly Company at the rate of \$71.21 per month on the first mortgage for twenty months.

MR. HALPER: I thought that was \$71.19, but that's all right.

THE WITNESS: That is a total of \$1424.20.

THE COURT: For how many months?

THE WITNESS: Twenty months.

Payments to the Colonial Investment Company, who hold the second mortgage, \$608 at \$32 a month for nineteen months, plus a payment—

MR. HALPER: What was that, six hundred and what?

THE WITNESS: Eight dollars.

MR. HALPER: Even?

THE WITNESS: Yes, sir.

MR. HALPER: And an additional payment?

THE WITNESS: An additional payment on July 23. of \$150.00.

THE COURT: Do you have that total?

THE WITNESS: The total for those two items amounts to \$6416.98.

• • • •

103 MR. BOLOTIN: That item which Your Honor has as \$2784.78 includes the \$2500 he is talking about, which went to Colonial, plus \$284.78, which were the additional settlement charges. We have grouped that as one item to the title company.

THE COURT: In other words, he is claiming interest on the first five hundred dollar deposit, on the second five hundred dollar deposit, on the \$450 paid for the extras, plus \$2500 out of the \$2784.78, plus \$284. In other words, it is the entire \$2784?

MR. BOLOTIN: That's correct.

MR. HALPER: The reason he is separating it, Your Honor, he is going to compute interest from the
104 date the interest accrued, on the theory that all the interest didn't accrue at the same time, is that right, Mr. Taylor?

• • • •

108 Q * * * I understand that you and your wife are the only members of the family, is that correct? A That is correct.

Q How many bedrooms are occupied in your house? A One.

Q Have any other persons beside yourself and your wife had occasion to use the toilet or bathing facilities?

A No, because we do not entertain. We are too
109 embarrassed to entertain.

Q Have you ever had any overnight guests? A No, we have not. We have no facilities, no bed.

Q Have you and your wife resided continuously from March, '48, to this date at this residence? A No, we have not.

Q Will you please explain to the Court. A In February, the last of February of 1949, I left on an extended trip. I tried a case in Texas, had to proceed from there to Mexico City. I returned about a month later.

We were there until—for about two weeks, and then about the tenth of April, both of us left for New York, where I was on business for some ten days.

Immediately upon our return, my wife left for the west, and she returned some time, I think, in June.

In the meantime I had been away a few days now and then. I cannot be accurate when it was, on short trips to New York.

We left the twentieth of July for the west. I returned on September third. My wife returned the first week in October.

During the month of September, during that period, I was in New York on two occasions for about four or five days each. I just don't recall exactly, but on business. So that the two of us have been here—I have been to
New York, incidentally, twice since then, so I
110 would leave my wife there alone, within the past few weeks.

* * * *

Cross Examination

BY MR. HALPER:

Q Mr. Taylor, do you recall me visiting the place last Saturday with Mr. George Warner? A Yes.

Q And that visit was pursuant to an order of the pretrial judge, Judge Laws, the chief judge, that I visit the place with not more than two witnesses? A Yes.

Q And Mr. Warner and I went into the house, did we not? A You did.

Q And also went around the premises, around the yard, front and back? A You did.

Q Do you remember us—when we entered into the house, do you remember us—do you remember that
111 we entered the bathroom? A Yes.

Q And I asked you to flush the toilet? A I don't recall you asking me that.

Q Do you remember answering, "You know what a toilet is like, you have seen it work before?" A I don't recall those exact words, but you may have said it.

Q Something like that? A You may have said it.

Q Mr. Taylor, you stated at the outset, when you first went in, when you first took possession, you immediately noticed something wrong with the toilet? A Yes.

Q Did you decide at that time that you weren't going to stay there, that you didn't want to stay there? A No.

Q When did you make your decision? A I didn't make any decision until about January of this year, until I had found out that the thing wouldn't work. I had all my life savings in the place.

Q That's when you made up your decision? A Definitely, because I was given to believe that everything would be nice.

Q Yes? A If there was some little defect, I
112 thought it could be easily cured.

Q And the Colonial Investment Company did

make an effort to cure the defect, isn't that true? A Made an effort, what do you mean?

Q Made an effort and accomplished an effort. A All they did was dig a couple of dry wells, or three dry wells, that's all.

Q And that you think is no effort at all? A It certainly isn't permanent.

Q It isn't permanent? A No.

Q They did dig two extra dry wells, according to your testimony? A They dug a total of three.

Q And in your opinion did that remedy the situation to any extent? A Temporarily.

Q Temporarily? A That's all.

Q When you say temporarily, what do you mean? Do you mean that they would, in order to remedy it permanently, have to keep on digging dry wells? A Either that, or pump out the septic tank, or put in a sewer. It never can work.

Q You weren't promised a sewer, were you?
113 A No.

Q And the salesman, Mr. Lewis, that spoke to you, didn't tell you anything about the septic tank except to say that it would work, and would have to be cleaned out every three years? A Three to five years, he said there would be no difficulty.

* * * *

Q How does your system work now—the septic tank system—right today, presently? A Well, I wouldn't know how the system works. All I can say is it hasn't started to back up. I can't say how the system
114 works. All I can say is that the sewage goes into the tank, and I don't know what day it will start to back up. That's all I can say.

Q In other words, presently it works properly, but you are apprehensive that it may start acting up any time, is that your point? A That's right.

Q But right now it's all right? A I don't say that the system works. I say that the water goes into this tank, that's all I know. I can't say that the system works. It goes into this big—the regular tank, that's all I can say.

Q So far as flushing toilets and using the washing machine, and using the bath? A We don't use the washing machine.

Q You don't use that at all? A No.

Q As far as using the other facilities, does the system presently work, so far as you can see? A As far as I can see, it takes the water, yes.

Q Mr. Taylor, to the rear of your house there is another house, is there not? A There is.

Q Almost directly in the rear. That house has
115 been there for many years, hasn't it? A I don't know how long. Was there when I came.

Q And as far as you know it wasn't built by Colonial?
A As far as I know.

Q Doesn't it look to you as though it were a house built about fifteen years or more? A I have no idea.

Q Do you know whether or not that house is served by a septic tank? A It is.

Q As a matter of fact, a lot of the houses in that vicinity other than the Colonial subdivision are served by septic tanks, is that right? A I don't know. As far as I know.

Q Would you say as any of the difficulty such as discharging the waste on the surface of the ground comes from these adjoining lots in back of you? A No.

Q Doesn't the ground slope towards you, the rear lot—doesn't that ground slope towards your house? A No, it slopes toward the south.

Q Your house faces the north, is that it? A No, you see, my house, my property adjoins this house on the east. There is an east border. That ground from there, it doesn't go directly west, it goes south, it tips a little

south. You can see the way the sewage from this
116 place runs south.

Q Then you don't have any flow of water from their land down to yours? A Only on one particular, on the southeast corner of my premises, which I testified to, it runs as it goes south, it comes a little west to the border of my hedge and kills some of my hedge.

Q Incidentally, when were those hedges set out? A I think in October, probably, of 1948.

Q You came in in March of 1948—that is, you took possession, full possession? A That's right.

Q I think you said about the twenty-seventh? A That's right.

Q And your difficulties arose just about the time you moved in? A That's right.

Q And continued on until January, when you decided you were going to give up? A That's right.

Q In October of 1948, how did you feel about continuing in possession? A Well, I felt at that time that the situation would be corrected. I thought there was

talk then that there might be a sewer put in, that
117 the Colonial Investment Company would do something. I don't know. I can't say that there were no promises, mind you, but there was a lot of talk around the neighborhood that there would be a sewer put in.

Q And at that time, then, in the fall of 1948, you thought you might remain in possession? A I felt then, because I had been led to believe every time I would call Colonial, that the situation was going to be corrected, we are doing everything we can.

I relied also during the summer of 1948—I was so desperate I called one Mr. Angell, a representative of a life insurance company, who has the first mortgage.

He said, "Well, you have no contract with us. We can't make them do anything, but we'll see what we can do."

He later said that he had received a letter from Co-

lonial Investment Company, where they were going to stick with this situation until it was finished. I asked him to send me a copy of the letter. He never did.

Q Then, in October, 1948, you would say that at that time you hadn't made a decision to leave the place or to ask for recision? A I couldn't.

Q You didn't? A I didn't, no.

Q When you set out these shrubs in October, 1948, that would indicate in your mind that you had an
118 idea of staying there, isn't that right? A That's right.

Q And these shrubs, of course, were put in for permanent use? A That's right, according to a plan. We had them come over—where they should go, and all of this.

Q And most of your outside expenditures, which you say amounted to \$410.90 were for shrubbery? A And hedge.

Q Except \$59 for outside electric sockets? A That's right.

Q Incidentally, why did you put the outside electric sockets in? Was that something that you wanted for your own benefit, or did they promise to put those in? A No one promised to put those in. I thought, if I wanted to hook on, and have lights to work at night, or if I wanted to run an electric lawn mower; many, many uses—

Q So, actually, you spent about \$350, roughly, in shrubbery, for which you want compensation. You spent \$59 for outside sockets, and the rest of it was landscape consultation, and all sorts of shrubs and trees? A That's right.

Q How large are those shrubs? For instance, take that barberry hedge that extends all the way around your lot? A That is five hundred and some odd feet.

119 Q And they are about at intervals of a foot, I would say? A Yes, about a foot.

Q So you would have about five hundred plants? A That's right.

Q And how tall are they? A I couldn't tell you. That's very difficult to say. I think the man told me they were two years old, or three years old, or something, I don't know.

Q About a foot tall? A They are more than a foot tall now.

Q About eighteen inches? A At least that, I'll say.

Q We'll settle for eighteen inches. Aren't they removable? A I suppose you can always dig up a tree, or you can dig up any kind of a shrub—I suppose they are removable. I don't know how.

Q You don't know how? A I'd hate to dig them up and get my hands in all those thorns.

Q A nurseryman makes a business of digging them up and transplanting them, doesn't he? Can't he go out there and dig them up? A I don't know.

120 Q You are sure you don't know? A I don't know that a nurseryman comes to a house and buys that, I don't know.

Q You have no trees there that are tall trees. They are all saplings, aren't they? A No, they aren't. The linden trees are pretty good sized trees.

Q How old is that tree? A I don't know how old they are.

Q How tall is it? A I should say that they are ten or twelve feet tall. You could judge. I don't know. You saw them.

Q And they are removable, too, aren't they? A After you put a tree in the ground, and it's been there for over a year, I don't know, but somebody tells me it isn't a good thing. I don't know.

Q It was removed from some nurseryman's field for your lot? A That's right, and a year has elapsed since then.

Q October, 1948? A Yes.

* * * *

123 Q These trips that you took with your wife and business trips and all weren't compelled by any conditions around the house, were they? A We used any excuse we could, she did, "If you will please take me, or let me go."

Q She visited her folks, did she not? A Yes, but she stayed much longer—I don't like to go into—if you would like me?

Q You needn't. A Why she wanted to stay away.

Q I just asked you a general question, whether it was compelled that way, and you haven't made a responsive answer, so we'll just pass it up anyway.

You have never lived in a house before of this type. You and Mrs. Taylor haven't had any former houses like this, have you? A I haven't.

Q You have lived in apartments most of the time, is that it? A My wife has lived in homes.

Q You don't propose to buy another house,
124 do you? A I know one firm I won't buy one from.

Q What's that? A At the moment I don't intend to.

Q As a matter of fact you want to get away from there, whether there is a septic tank or not, isn't that right? A No, that isn't true.

Q Don't you want to go and take up apartment house living, as a matter of fact? A No, I don't. If there was good sewage there, it's a beautiful drive down the highway, it's nice to be out, but you can't stand the odor, and the health around there, that's the thing that's driving me away.

Q It's nice out there in the summer, but not so nice in the winter? A It isn't nice in the summertime either when you get sewage odors around.

Q Most of your odors come from your friend in the back that has occupied the land not owned by Colonial, isn't that right? A That's one place I know. I don't know. It comes probably from further up the street.

MR. BOLOTIN: How can he tell which house the odor comes from. It gets into the air.

MR. HALPER: He has volunteered. That is
125 a proper question. You are not objecting to the question. You are objecting to the answer.

* * * *

Redirect Examination

BY MR. BOLOTIN:

Q Mr. Taylor, I have about two or three questions, please.

You told the Court that Mr. Halper and Mr. Warner visited your premises recently. What was the total time that they remained and examined the premises, both exterior and interior? A Oh, I should say thirty minutes—twenty-five minutes.

Q That was the extent of their investigation, correct? A I should say about that.

Q Would you say it was an hour? A I wouldn't say it was an hour.

Q Mr. Halper questioned you about last October, 1948, as to whether or not Colonial had assured you the situation would be corrected. Did you up until October, '48, have any reason to doubt the word of Colonial that the situation would be corrected? A No, I just kept relying on it, because you would say they must do something, because there are so many people in this situation around here that they must. You just felt that they would be compelled to, or that they would correct the situation.

Q Subsequent to October, 1948, did you have
126 any conversations with Colonial as to correcting the condition? A In December, which I testified to.

Q Did you receive any assurances then that the situation would be corrected? A Said that they would do everything they could. I testified that I talked to Mr.

Taube and that he had—they were doing everything they could.

Q Did you have any reason in December, 1948, to doubt the word of Colonial that the place would be corrected? A No, I didn't, because they came in, they paid for pumping this thing, and I thought eventually they are going to do something.

Q They paid in December, '48, is that correct? A December, '48, yes.

Q When did you first doubt the word of Colonial as to whether they would correct the situation? A When I received that letter from Mr. Taube and about the same time is when I saw this report from the Virginia Health Authority that it couldn't be taken care of without a sewer, and when Mr. Taube said that he had read this report, and said that the recommendation was ridiculous.

Q By that letter you mean the letter in evidence as Plaintiff's Exhibit No. 2, dated January 5, 1949? A That's right.

Q When was it you made up your mind that
127 you were going to ask to rescind the contract? A

Immediately after that I came to your office, it was within a few days.

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128

Donald J. Wilkins

was called as a witness by the Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

• • • •

129 Q Colonel, please tell the Court where you reside? A I live at 366 Washington Avenue in Wellington Park Estates.

Q Where is that with reference to Mr. Taylor's property? The plaintiff in this case. A I am on the same

side of the street and five houses north of Mr. Taylor's house.

Q Your house, I believe, is at the dead end of the street, is that correct? A My house is the last house on the street, yes.

Q With reference to topography, is your house higher or lower than Mr. Taylor's? A My house is slightly higher.

Q In other words, the ground slopes down from your house toward his house? A Yes, sir.

Q That would be from north to south? A Yes, sir.

Q Colonel, when did you first move into your present home? A I moved into my house on the 26th of February 1948.

Q When did you first meet Mr. or Mrs. Taylor? A I met Mr. Taylor in April, 1948.

Q Do you recall when Mr. Taylor moved into 130 his house? A Yes, he was a resident.

Q Do you recall the time he moved in? A Mr. Taylor moved in, I would say, in March, 1948.

Q That was about how long after you moved in, roughly? A About a month.

Q Mr. Wilkins, has your acquaintance with Mr. Taylor extended from April, '48, up to this time? A Yes, sir.

Q Are you familiar with Mr. Taylor's house, both interior and exterior? A Yes, I am familiar with his house, both interior and exterior.

Q Have you visited his house? A Many times.

Q Are you familiar with the condition pertaining to the septic tank system on Mr. Taylor's lot? A Yes, sir, I am.

Q That is from personal observation? A Yes, sir.

Q When did you first become familiar with that system? A I would say in April, 1948.

Q I am talking about Mr. Taylor's, now. A Yes, that's right.

Q Would you be good enough to tell the Court what

you saw and observed about Mr. Taylor's septic
131 tank system? That is, all the conditions pertaining to that system as it existed in his lot, giving dates, if you don't mind. A My acquaintance with Mr. Taylor dates from the fact that I learned soon after he moved in there that he was having trouble with his sewage and his septic tank system, and consequently, I went down to introduce myself, met Mr. Taylor, and told him that I was having similar problems and I was interested in his problems. And he showed me his property and in his back yard—

Q One question. From whom did you buy your house?
A From the Colonial Investment Company, or the Wellington Park Estates, Inc., who have an interchangeable board of directors, apparently.

Q Would you proceed, please? A Mr. Taylor showed me about his premises, particularly his back yard, there, where he was having a condition of sewage oozing to the surface over the extent of his back yard.

Q Did you continue after that to observe at any time the condition in his back yard? A Yes, my contacts with Mr. Taylor, as a neighbor would be on an average of probably every week or two. I would see him on a Saturday or Sunday. I would go down to his house, or he'd come up to my house, and we would discuss our mutual sewage and sanitary problem. I'd look at his
132 and sympathize with him, and he'd come up to my house and look at mine, and sympathize with me, and try to decide whose was the worse.

Q How long did this continue, Colonel Wilkins? A Well, this continued as far as my acquaintanceship with Mr. Taylor, up to the present time, and our discussions of the sewage and the septic tank situation also continue up to the present time.

Q Did you observe Mr. Taylor's condition—for example, the latter part of '48 and early part of '49? A Yes, I observed Mr. Taylor's condition. I particularly

remember the time, when the condition would be bad, Mr. Taylor would come up and say, "You come down and look at mine."

Q What did you see at that time? A I saw this condition of sewage in his back yard, at particular times that I would remember, would be, I would say, in April and May of 1948, at which time I was having the same trouble, and then again during the late fall and winter of 1948, and early spring of 1949.

Q About how many times would you say all told that you observed this condition which you are now describing on Mr. Taylor's property? A I'd say at least a dozen times.

Q Are you familiar with the general condition pertaining to the septic tank systems of the other neighbors that are contiguous to your area? A I believe I
133 am very familiar with them, because I have made a personal survey.

MR. HALPER: I object to any testimony as to other neighbors, Your Honor, as well as to his own in this hearing.

MR. BOLOTIN: I will qualify the question this way: On properties constructed by, or sold by, Colonial or Wellington.

MR. HALPER: I object to that.

THE COURT: I really don't think it is material. After all, it is just your case here.

BY MR. BOLOTIN:

Q Can you tell us, Colonel Wilkins, the very first time that you called the attention of Colonial or Wellington to the situation on your premises?

MR. HALPER: I object to that, Your Honor.

MR. BOLOTIN: If the Court please, we thrashed that out yesterday. It is being offered for this reason. I didn't know the answer myself yesterday, but Mr. Barr testified yesterday that he notified Colonial some weeks prior to the time the house was sold to Taylor. That serves

the purpose, at least, to show that Colonial was put on notice that there was something radically wrong, and they knew, or had reason to suspect that something was wrong if they didn't actually know.

THE COURT: This witness moved in—he was living there at the time the Taylors' moved in.

MR. BOLOTIN: He moved in a month before
134 the Taylor's moved in, Colonel Wilkins did. I want to find out whether he had occasion to call to the attention of Colonial some time before the Taylors bought the house.

THE COURT: You may ask that for the purpose of showing knowledge.

BY MR. BOLOTIN:

Q Did you have occasion to notify either defendant about the conditions surrounding your tank prior to March 5, 1948? A No, sir.

• • • • •

Q Colonel, do you know whether or not the situation surrounding the septic tank on Mr. Taylor's lot was ever discussed between Colonial and the health authorities or the sanitation officials of Fairfax County? A Yes, I do.

Q Can you tell the Court, please, just what you know about that? A Mrs. Wilkins and I had made several complaints to officers of the Colonial Investment Company during the fall of 1948, and I arranged—I also
135 talked to the County Health Officer at that time, and I arranged for a meeting in December, 1948, at my property with Mr. South, who installed the septic tanks and the septic fields and a Mr. Gibson, a representative of the County Health Officer.

They came out there to inspect my premises, and Mr. Taylor's premises at the same time. We met at my house and went over my premises, and my condition; and they then went down to Mr. Taylor's house to inspect his premises.

Q Was anything said at that time about the condition pertaining to the septic tanks or the general effect it would have on health?

MR. HALPER: Just a minute. Was anybody representing Colonial present?

MR. BOLOTIN: He said Mr. South, who constructed the thing, was there.

THE COURT: I wasn't sure who Mr. South was, but I assume he is one of your men.

MR. BOLOTIN: He is the man who put the tanks in there for Colonial. He is their employee.

MR. HALPER: That depends, if he is an independent contractor, which he probably is; or a subcontractor, he wouldn't necessarily be an agent to make statements and bind the Colonial, bind the defendants.

I think, Your Honor, his agency or his relationship with the defendant should be shown before any statements are made.

MR. BOLOTIN: Let's find out what they did.

THE WITNESS: In talking to Mr. Levin of the Colonial Investment Company during November of 1948, I asked him the name and address of the contractor who had installed the septic tanks and the septic fields for them, and he gave me the name and address of Mr. South.

BY MR. BOLOTIN:

Q Let's put this question to you, Colonel Wilkins. At the time you consulted with Colonial about arranging this appointment, was it understood that they were sending Mr. South out as their representative? A It was understood that I was to call Mr. South and have him come out and participate in this meeting with the County health authorities.

Q And he was there in whose behalf? A Mr. South was there as the contractor who had installed the systems and his name and address were given to me by Mr. Levin of the Colonial Investment Company, to participate in this meeting, and this survey of the situation, of which

a report was to be given to the Colonial Investment Company.

They were apprised of the meeting, and if there was any representative of theirs desired at that time, it was a question for them to decide. They knew of the
137 meeting, and asked that a report of it be furnished them, which it was.

MR. BOLOTIN: I think that is sufficient, Your Honor. They designated him as their representative to attend this meeting and to participate in formulating this report.

THE COURT: When you went to Mr. Levin, he understood the purpose of the meeting?

THE WITNESS: Yes, Your Honor. I told him in the course of my conversation with him that my situation was intolerable there, and something had to be done, that it was a definite health menace to myself and my family and my young children, and some action had to be taken, and that I was going to call the County Health Officer to come over and inspect it, and I invited Mr. Levin to have a representative of the Colonial Investment Company attend the meeting; and he gave me the name and address of Mr. South as the contractor who installed the systems and suggested that I call him and have him attend, and have a copy of the findings and recommendations furnished to the Colonial Investment Company.

THE COURT: Very well.

BY MR. BOLOTIN:

Q Will you now proceed to tell us the nature of the survey that was made by this group, including Mr. South, and also what was said about the condition, including the health situation? A Mr. South and Mr. Gibson
138 both agreed that the situation was—

Q Mr. Gibson is in court here. Do you recognize him? A No, I don't.

* * * *

139 Q Will you continue, Colonel, and describe what happened, and what was done, and what was said?

A Mr. South and Mr. Gibson both agreed with me that the condition concerning the sewage and sanitary condition on my premises was intolerable and a menace to the health.

MR. HALPER: I object, Your Honor. He is now talking about—"my premises," did you say?

THE WITNESS: Yes, sir.

THE COURT: This was a conference about these two properties. I think it would be better if you would just indicate what was said at the time.

MR. HALPER: About the Taylor property.

140 MR. BOLOTIN: If the conversation includes both properties, it will have to mention it, but don't give any specific complaints about your property, if it just pertains to your property. If it is a general discussion about both, you may proceed in that direction.

THE WITNESS: Well, it included the Taylor property in the statement that I have just made. That was their opinion of the situation. Any further details that I discussed with him concerned my own property.

BY MR. BOLOTIN:

Q Was there anything said specifically about the health conditions as it affected the health of the Taylors and other people in the neighborhood? A Well, it was generally agreed that the condition was a menace to the entire community, and that some definite measures must be taken that would permanently remedy the situation.

Q Were any measures taken to permanently remedy the situation, so far as you know? A No, sir.

MR. BOLOTIN: No further questions.

Cross Examination

MR. HALPER:

Q Colonel Wilkins, did you visit Mr. Taylor's
141 premises recently? A Yes, sir.

Q What did you observe with reference to conditions there now? A I haven't observed any external

conditions that I could describe as being any evidence of sewage, as I had previously noticed, there at the present time.

Q How about internal conditions? A I haven't inspected any internal conditions.

Q This meeting in November or October? A December.

Q December, 1948 with Mr. South and Mr. Gibson; did you at that time go to Mr. Taylor's property? A No, Mr. South and Mr. Gibson had been to Mr. Taylor's property.

Q Then they came to your place, is that right? A Yes, sir.

Q And they made an inspection there? A Yes, sir.

Q And really all the conversation at your place pertained to your house, did it not? A Their statements as to the general conditions there referred to the entire community.

Q Do you mean by that that the insanitary conditions in your place and in Mr. Taylor's place affect the
142 entire community? Is that what you mean? A

Yes, sir. They said that the conditions at those two houses were intolerable, specifically referring to my house and Mr. Taylor's, and then they said that such a condition as that in any community was a menace to the community.

Q Then do you know whether the health authorities made an inspection after that, or whether they did anything to remedy that condition or to compel the remedying of the condition? A They prepared the recommendation based upon that inspection of which they sent a copy to the Colonial Investment Company and a copy to me.

Q You never saw Mr. Weston before the time you came to court, did you? A No, sir.

Q Was that after or before Mr. Weston's investigation? A To my knowledge, that was after Mr. Weston's investigation.

Q As far as the health authorities remedying the condition, you don't know anything about that, do you? A No, sir.

* * * *

Edward L. Ashley

was called as a witness by the plaintiffs, and being first duly sworn, was examined and testified as follows:

143

Direct Examination

* * * *

Q What is your occupation or business? A I build, repair, and clean septic tanks.

Q Are you familiar with the septic tank at the Taylor residence at 390 Washington Avenue, Wellington Park Estates? A Very much so.

Q When did you first have occasion to see that septic tank system? A I was called there on November 28, 1948.

Q By whom were you called? A By Mr. South.

Q Do you know who Mr. South is? A He is the man that installed the tank.

Q What did he tell you? A He said it was having trouble, for me to go down and pump it out.

MR. HALPER: Mr. South.

* * * *

145 Q Mr. Ashley, as a result of your conversation with Mr. South, you then proceeded to 390 Washington Avenue, is that correct? A Right.

Q I think you stated the date was what, sir? A November 28.

Q You finally went to the premises, correct? A I went there that day, yes, sir.

Q Whom did you see there? A Mrs. Taylor was there.

Q Was your attention directed to the septic tank? A Yes, sir.

Q Now tell the Court, please, in detail, what you saw and what you did. A Well, I didn't go in the house.

146 She told me that as she flushed the stool it would back up. I told her that the tank was full. So I went out and located the tank, which wasn't hard, because it had been dug up before. Well, when I took the cover off the pressure from the water in the ground pushed the water up above the top of the tank. Well, I proceeded to pump it out, and when I got down below the outlet of the tank, water would begin to come back in from the earth.

I carried away eleven hundred gallons. And on the second trip—in the meantime, I am gone, the drain field still running back, or the dry wells, whichever the case might be. And I take another 500 gallons or so. That was on November 28, 1948.

THE COURT: Do you mean as you would take it out, it would fill right up again?

THE WITNESS: Yes, ma'am, it would come right back up in the tank.

BY MR. BOLOTIN:

Q From where, Mr. Ashley? A From out of the ground. You see, the drain fields or dry wells were water-logged, and the water table was so high that the pressure would push it back in. It was higher than the outlet.

Q You could see that? A Yes, sir.

147 Q Did you have occasion to observe the ground adjacent to the tank? A The ground was wet and soggy around.

Q What kind of earth was it? A It's hard as can be.

Q Can you tell the Court what was the basic cause for the water coming, forcing its way back into the tank from the earth? A The earth is so hard around there it just won't absorb the water, and that's the purpose of a septic tank system, the earth has to absorb what water

goes out in it. In that type of soil it won't absorb the water.

Mr. Ashley, what was the charge for your service on that first trip? A Thirty-five dollars.

Q And who paid that? A Mr. South.

Q Did you have occasion to go back to the premises any time after November 28? A I went back there on December 19.

Q Will you explain to the Court what you saw there on that date? A The same thing. It was the same condition.

Q Be a little more specific, will you, please? A Well, I made the two trips, first time, and the water ran back on the second trip.

148 Q Mr. Ashley, you told us that your business is building, repairing and cleaning septic tanks. I want to ask you this question, as an expert. Was this condition that you saw, which required these two successive pumpings, is that something that is normal or usual to a septic tank, or something which is abnormal? A No, sir, it isn't normal, no, sir.

Q Did you have occasion to go back to the premises after December 19? A I was back there December 24th.

Q That is five days later? A Yes, sir.

Q What did you find at that time? A The same condition. The tank was full. Well, it was up over the top; after I had broken the seal on the tank the first time, the water was standing way above, about a foot above the top of the tank itself.

Q Where was the water with reference to the surface of the ground? A Within about a foot of the top of the ground.

Q Above the ground? A Of the top.

Q That is, your ground surface? A The water is about half way between the top of the tank—about a foot above the top of the tank.

149 Q Is that a normal condition, or abnormal condition? A That's abnormal.

Q I show you this photograph that is marked Plaintiff's Exhibit No. 13 for identification, and ask you if you recognize what you see in the picture. A Yes, sir.

Q What does that show? A Well, that shows the water was about a foot of the top of the ground, as I stated.

Q A foot below the surface of the ground? A That's right.

Q And a foot above the top of the tank? A Above the top of the tank, yes, sir.

Q What did you do on that occasion, December 24th? A Well, I pumped it out as I did in the past, and the same thing happened.

Q Did you notice whether the water was forcing itself back from the surrounding earth? A It ran back through the outlet back into the tank.

Q Did you notice whether there was any unusual amount of water or sewage coming in from the dwelling itself which filled the tank that fast? A Well, no, sir. They'd have to use an awful lot of water to fill it that fast.

Q By awful lot you mean about a thousand
150 gallons? A I think that's what that tank is, a thousand gallons. I mean that's what it should hold. It might be more than full, and the water running back.

Q Was there anything, as far as you could see in cleaning the tank, that indicated improper usage by the occupants of the house? A No, sir.

Q Who paid for the cleaning of December 19 and December 24th? A Colonial Investment Company.

Q Did you have occasion to go back there after December 24? A Well, see, I was back there in January.

Q Do you recall the date? A I don't remember the exact date.

Q Would your bill help to refresh your recollection? A Yes, sir.

Q By the way, you operate as the Odorless Septic Service? A That's right.

Q I show you two of your bills in January, and see if they help to refresh your recollection. Will you tell us now, after having your recollection refreshed, your very next trip after December 24th? A Was January the 1st.

151 Q 1949? A 1949, yes, sir.

Q Tell the Court what you observed at that time. A It was the same condition, Your Honor, the same thing over and over.

Q Did you pump it out at that time? A Yes, sir.

Q Who paid for that pumping? A Colonial Investment Company.

Q Did you have occasion to go back after New Year's Day, 1949? A I was back on the 8th then, yes, sir.

Q 8th of January? A Yes, sir.

Q What did you see at that time? A The same condition.

Q And who paid for that? A Mr. Taylor paid for that.

THE COURT: What date was that?

THE WITNESS: That was January 8 of 1949.

BY MR. BOLOTIN:

Q Did you have occasion, Mr. Ashley, to go back to this dwelling after January 8, 1949, for any reason whatsoever? A I think the next time was in February.

Q Can you give us the approximate date? A
152 No, I had that list with me yesterday, but I don't remember the exact date now.

Q What did you observe in February? A The same condition.

Q That is, the tank was full? A Yes, sir, the tank was full, and as I pumped it out, it ran back.

Q Mr. Ashley, I ask you this question: Were you retained by Colonial to do any other pumping on any other dwellings on that street or in that particular area?

A I was called on three others by Mr. South.

Q How recent were your calls? A One was the same day as I went to Mr. Taylor's the first time, November 28.

Q Were there any prior to that date? A Yes, sir.

Q Can you tell us whether or not there were any occasions to go there prior to March 5, 1948? A Yes, sir, I was there when they first started the construction.

Q And who called you then? A Mr. South.

Q That is prior to March 5, 1948? A Yes, sir.

Q Can you tell us about what month or year?
153 A Well, it must have been in January or February, along in there.

Q '48? A Yes, sir.

Q What were the occasions of your visits at that time?
A Well, this was down on Bolling and Greenway Road, or Streets, whichever they might be.

* * * *

THE COURT: These properties that you are testifying about prior to March 5, 1948 do you know whether or not they were Colonial Investment?

154 THE WITNESS: Yes, ma'am, they were.

THE COURT: They were?

THE WITNESS: Yes, ma'am.

THE COURT: Do you know that of your own knowledge?

THE WITNESS: I know that.

THE COURT: Very well.

BY MR. BOLOTIN:

Q Will you tell us, please, about what occasions you had for doing work on septic tanks prior to March 5, 1948? A Mr. Burnett—I remember him very well, but the other two I don't—Mr. Burnett lives on Green—on Bolling Road.

THE COURT: How close is that to the Taylor property?

THE WITNESS: I think that is one or two streets over.

BY MR. BOLOTIN:

Q In number of feet, how far would you say that was?

A I wouldn't want to say, because it is quite a distance. It isn't like the regular streets, it is a little farther.

THE COURT: Is the topography the same?

THE WITNESS: Ma'am?

THE COURT: Same general—

THE WITNESS: Same location.

BY MR. BOLOTIN:

Q Same type of soil, same general conditions
155 prevailing? A Yes, sir.

Q Do you remember the approximate date of your invitation to go there? A I got Mr. Taylor's done on the 28th.

Q I am talking about prior to March 5, 1948. A I don't remember whose they were, because Mr. South called me and the people had only lived there for a week or so when they had their trouble.

Q What month was it, would you say? A It was January and February—January '48.

Q Those houses you worked on were occupied at the time you came there? A That's right.

Q Was it the same general complaint, the tank being filled? A Yes, sir.

Q Mr. Ashley, what was your last visit, up to today? A Do you mean in that area?

Q Yes. A I was at Mr. Hudson's this week.

Q Where is Mr. Hudson's house located with reference to Mr. Taylor's house?

* * * *

157 Q Where is Mr. Hudson's house with reference to Mr. Taylor's house? A Two doors above on the same side of the street.

Q That's Washington Avenue? A Washington Avenue, yes, sir.

THE COURT: Do you know whether or not that is a Colonial Investment property?

THE WITNESS: Yes, ma'am.

MR. BOLOTIN: Mr. Hudson will be here, Your Honor; it is Colonial Investment property.

BY MR. BOLOTIN:

Q Mr. Ashley, I understood you to say that you not only cleaned, but you also constructed and repair septic tanks, is that correct? A Yes, sir.

Q Did you have occasion to inspect the entire septic tank system on Mr. Taylor's property during the course of your visits there? A Well, I didn't inspect the entire system. I mean, I didn't dig down into the earth, because I could see when I pumped it out that the earth wasn't absorbing the water.

Q In your opinion, Mr. Ashley, is that the type of earth where a reasonably prudent person would
158 construct a septic tank system? A Well, it won't work in that type of soil, no, sir, not satisfactory.

Q Can you tell the Court, in so far as the septic tank itself is concerned, whether that was constructed properly? A The tank itself was constructed properly, yes, sir.

* * * *

Cross Examination

BY MR. HALPER:

Q Mr. Ashley, do you know how many septic tanks there are in that neighborhood? A No, sir, I don't.

Q Do you know whether there are more than ten? A Yes, sir.

Q More than fifty? A Yes, sir.

Q Are there a hundred, or two hundred? A I don't know about that.

Q Do you know where Groveton is? A Yes, sir.

Q Have you ever done any work there? A Yes, sir.

159 Q What kind of work? A Cleaning.

Q And where is Groveton with relation to this property? A It would be west, I guess.

Q And how far distant? A I'd say a mile and a half.

Q Do you know what kind of soil is there? A The same type of soil.

Q Does it have trouble up there? A Yes, sir, plenty of it.

Q Do you clean out tanks there? A Yes, sir.

Q And did Colonial build that Groveton subdivision?

A I don't know about that.

Q Yes, you do, don't you? A I don't know whether they are building any houses there or not.

Q Do you know who built Groveton? A No.

Q You don't? A No, sir.

Q Do you know whether any houses around this place here other than those that Colonial built? A Yes, sir.

160 Q Same kind of soil? A Yes, sir.

Q Tanks work all right? A No, sir.

Q According to you, all of these tanks are worthless?

A No, sir, I wouldn't say all.

Q Where are the good ones? A Well, now, there are some good ones around and about, but they are not all good ones.

Q In other words, you are prejudiced against septic tanks, even though you are employed to— A That's right.

161 Q What, in a normally-functioning septic tank, is the period of time necessary for cleaning it out?

A Well, they ought to be cleaned three to five years.

Q That is normally functioning? A Yes, sir, normally.

• • • •

Phillip C. Byrd

was called as a witness by the plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

• • • •

Q By whom are you employed? A Associated Engineers, Inc.

• • • •

A Well, we do various kinds of surveying, engineering work, such as boundary surveys and topographical work.

Q What does that mean? A Topographical surveying, lay of the land, and stake out construction projects, roadways.

162 Q Does your work include examination of soil?

A That's right, sir.

Q Does that include examination of soil to determine its suitability for septic tank systems? A It does.

Q How long have you been doing that work, Mr. Byrd? A Since 1947.

Q Mr. Byrd, did you have occasion to make any test of the soil at the premises known as 390 Washington Avenue, Wellington Park Estates? A I did.

Q That is Mr. Taylor's dwelling? A Yes, sir.

Q Can you give us the date or dates that you made such tests? A October 24, 1949.

MR. HALPER: Just a minute. Your Honor, along these lines, of course, the theory of the plaintiffs' case is, as I say again, recision dates to the date of the contract. I presume he is attempting to prove this condition as existing today, and that it existed at the time of the contract. But of course this knowledge must be brought home to the defendants, this October 1949 knowledge. I

want to make that point, Your Honor, so that Your Honor will understand the nature of my objection.

163 MR. BOLOTIN: Of course, this testimony at the most is merely corroborative of the preceding testimony. This man was called in for the specific purpose of making a test. We will have to show, connect up, naturally, that the soil in October 1949 was no different than as it existed in March, '48. But I think the Court might well take judicial notice of the fact that soil doesn't change that fast.

Now, this man describing the soil can tell what he found October '49, and then the Court can deduce whether that description is the same as given by previous witnesses to describe the soil, who examined it in previous months. That is a matter for the Court in weighing the testimony. It wouldn't affect its admissibility.

THE COURT: You go ahead.

BY MR. BOLOTIN:

Q What was the date again, Mr. Byrd? A October 24, 1949.

Q Will you tell the Court what you did, and what you found? A Well, we went to Mr. Taylor's property and we dug two test holes, one on the north side of the disposal field, and one on the south side, and proceeded to make percolation tests. We found that in one hour the water—Mr. Weston testified yesterday as to how a test is made. In this case we put six inches of
164 water in the holes, and in one hour the water had dropped no measurable amount in either hole, and in 16 hours the hole—let's see, the water in the hole on the north side had dropped one inch, I believe, and the water in the hole on the north side had not dropped at all. You couldn't measure the drop.

Q What did that indicate to you? A That indicates that the ground is unfit for septic tank installation.

MR. BOLOTIN: No further question.

Cross Examination

BY MR. HALPER:

Q Were you here when Mr. Weston testified? A Yes, sir.

Q How deep was this hole? A In this case it was 30 inches deep.

Q Thirty inches from the surface? A That's right.

Q What was the nature of the soil? A Well, it had a few inches of top soil, and the rest was this hardpan, very dense clay.

Q You were concerned about the absorption of waste waters in the distribution fields, not in the tanks, isn't that right? A That's right.

Q How deep are the distribution fields?
165 A Well, they should be from two to three feet, no deeper, as Mr. Weston testified yesterday.

Q No deeper? A No, sir.

Q Is that because it is necessary to have this flow near the surface for purposes of disintegration and destruction, and so forth? A That's right. Well, you go below 30 or 36 inches below the surface of the ground, you get this hard clay any place, mostly, that will not take water.

Q Does the digging of dry wells take off some of that flow from the distribution field? A It would just fill up the hole, as far as I can see, down there. It wouldn't absorb in the dry well any more than it would in the fields.

Q How would you account for this, Mr. Byrd, that in a soil of that nature, of that character, that there would be many septic tanks in the vicinity, some as much as fifteen years old?

MR. BOLOTIN: That is merely an assumption.

MR. HALPER: He is an expert.

THE WITNESS: I don't know. All I know is that the tests were made on Mr. Taylor's property, and

showed the earth unfit for septic tanks. I don't know, it may change some place else. I don't know.

166 BY MR. HALPER.

Q In October, 1949, did you make any other tests? Did you use any of the facilities in the house to see if they worked? A No, sir.

Q Did you examine the main tank, the main disposal tank? A No, sir.

Q All you did was to make a percolation test of the soil? A Yes, sir.

Q Did you determine whether the soil 30 inches below was the same all over the place? You only went north and south, did you say, of the distribution field? A That's right.

Q Let's assume that a septic tank was installed in soil of this character. Would you say it was impossible for the septic tank to work under any conditions, under normal conditions, we will say? A I don't see how it could work very long.

Q Could it work for two years? A Apparently not.

Q Then you think the septic tank at Mr. Taylor's place is obsolete? A In that location it is.

167 Q Then you think they ought to close the house up and cease using the facilities under that condition, or would you say it is possible to continue using the facilities? A Well, I wouldn't want to particularly live there if I had to put out 35, 40 dollars every couple weeks on cleaning the tank.

Q Do you know whether septic tanks are preferred to sewage systems, or not? A Would you state that again, please?

Q Are they preferred? If properly installed, do they work as efficiently as a sewage system? A Well, no, because you still, even a good tank, you will have to clean out from three to five years.

Q Isn't it a fact that in your experience and your knowledge septic tanks are only employed because there

are no available sewer systems? A Yes, sir, that is usually the case.

Q You wouldn't find a septic tank where sewers were available, would you? A I don't know of any reason. It would cost you more to put in a septic tank than it would to hook up to the sewerage system.

Q It is only put in because sewerage isn't available? A That's right.

Q And requires cleaning out, which is not true
168 of sewage systems? A That's right.

Q And that has to be done from three to five years, in any event? A Yes, sir.

Q If there be a heavy season of rainfall, or abnormal season of rainfall, so that the earth is saturated with water to a greater extent than normally, wouldn't you say that cleaning out and pumping would be required more often than three to five years? A Well, down there I don't see how water could get below six inches, the surface of the ground, because that clay is so hard that it just won't take water. The top soil does absorb the water, and in that way takes care of any excess rainfall.

Q Did you hear this man, Mr. Ashley, say that whenever he pumped out the tank it would fill again from the seepage from the earth? He said it didn't come from the house. of course, he said that it came from the earth itself. Would that be due to the fact that the earth was unusually wet because of excessive rain? A No, I wouldn't think so. It's just probably from the waste from the house.

Q Then excessive filling of this tank, requiring considerable pumping, would be due more to the excessive use of water in the house than it would
169 to the saturation of the earth? A Well, no, in that type of tank, that type of soil, even if you used an average amount of water, you would have to clean out the tank more often than three to five years.

Q Going back to Mr. Ashley's testimony, he said that he pumped the tank out, and he came back a little later and it was filled again, but he said it didn't come from the house, came from the earth. Even clay, such as you found, wouldn't fill that tank by mere seepage in that time, would it? A Well, I don't know.

• • • •

BY MR. BOLOTIN:

Q One question, Mr. Byrd, on the question asked you by Mr. Halper pertaining to the excessive filling of the tank from the surrounding earth, would you say that the underground water table had some bearing on that?

A Well, I don't know about that, because we didn't hit any water in our test holes 30 inches down. Whether that's filled ground there or not, I don't know. The water table may be down five or six foot.

Q So from your own personal observation, you
170 can't answer that question, is that correct? A No, sir.

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172

Carlis C. Hudson

was called as a witness by the plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

• • • •

Q Where do you live, Mr. Hudson? A 382 Washington Avenue, Wellington Park.

Q Where is that with relation to Mr. Taylor's home?
A Two doors above.

Q On the same side of the street? A On the same side of the street.

Q In number of feet how far away would you say that is? A About 200 feet.

• • • •

173 Q When did you move into 382 Washington Avenue? A On February 6, 1948.

Q From whom did you purchase the house? A Colonial Investment Company.

Q Did you see the house while it was in the process of construction?

MR. HALPER: Your Honor, I am going to object to any details about Mr. Hudson's house that do not reflect upon the subject matter of our suit. Whether he looked at the house prior thereto—well, when he moved in in May, even, unless followed up, would be of no importance. But I think we are inquiring about Mr. Taylor's claim, and we have gone afield to all these other houses. We may have other cases.

MR. BOLOTIN: These are preliminary questions leading up to the principal question. I want to show his background for becoming familiar with Mr. Taylor's property.

MR. HALPER: Show that he is familiar, first, and then show his background.

BY MR. BOLOTIN:

Q Did you have occasion to see Mr. Taylor's house while it was in the process of construction? A Yes.

Q Do you remember when the Taylors moved into the house? A Approximately a month or a month and a half after I did.

174 Q Mr. Hudson, are you familiar with the condition of Mr. Taylor's dwelling as it pertains to his septic tank system? A Yes, I am.

Q When did you first become familiar with that condition? A Well, I would say within a very short period of time, a month or less, after Mr. Taylor moved into his house.

Q What was the occasion for your becoming acquainted with the situation? A Well, when I noticed that a sewerage pumping truck was pumping his septic

tank out, I became interested as to what kind of troubles he was having from a standpoint of health conditions in the neighborhood as such, and that I have a youngster and I wanted to be sure that he did not have a condition existing which would possibly cause spread of disease of some kind in the neighborhood.

Q Calling your attention to the period preceding March 5, 1948, did you have any difficulty with your septic tank? A I did.

Q Can you give us the approximate date? A Well, as I stated, I moved into my house on February 6, and within ten days after I moved into my house my septic tank backed up into the bathroom of my house,
175 overflowed from the toilet bowl onto the floor, out into the hallway, and into two bedrooms.

Q Did you apprise Colonial Investment of that condition?

MR. HALPER: Your Honor, I object to that. I object to any evidence about this man's house, and if counsel intends to prove notice to the defendants by these conditions, it is not proper for this reason: The fact that his tank does not work, and Colonel Wilkins' tank wasn't working does not indicate why they weren't working.

MR. BOLOTIN: If the Court pleases, I may as well bring this out—

THE COURT: I think that you should bring out more with respect to the similarity of the ground, if there is similarity in this area, because there might be one condition as to this place and another as to the other.

MR. BOLOTIN: Of course, the testimony already shows Your Honor, by Mr. Weston, that the entire area for miles around is identical. However, I intend to develop that point.

I would like to point this out to the Court. This has not been mentioned before. We asked the defendants, we served upon them request for admissions under Rule

36. The basis for the request was to develop that these defendants knew that septic tanks wouldn't function properly in this area, and that people in the area
176 were having trouble, which would indicate notice so far as our house is concerned. They have refused to admit or deny our request.

Assuming that they will now admit that they knew this entire condition, they are placing upon us the burden of going forward and proving all this because we don't know whether they still intend to admit it or deny knowledge of this condition.

THE COURT: I have assumed as we have gone along that your purpose in this type of testimony was to attempt to show knowledge.

MR. BOLOTIN: That is the principal point, to show that the defendant had knowledge, that the septic tanks in this entire area were not functioning properly prior to March 5, 1948, and they concealed that information from these plaintiffs, or deliberately told them a falsehood, that it was going to function properly. We are put to the burden of proving all that because they refuse to answer the request. That is the primary purpose of the question—notice as it pertains to deceit, and secondly, to show the unhealthy condition in the neighborhood and other collateral factors that are pertinent as to whether or not these people are entitled to rescind the contract and get out of that neighborhood.

MR. HALPER: Your Honor, I don't have any serious objection to this witness stating if he made com-
177 plaint to the company about the septic tanks.

THE COURT: That is the purpose of this inquiry, as I understand it.

MR. HALPER: Yes, so as to establish that they knew that septic tanks were bad. But, as Your Honor just suggested a minute ago, I would like to see some relationship between the complaints of Mr. Hudson and Colonel Wilkins to the Taylor situation. In other words,

if the septic tank at Mr. Hudson's place did not function because of some condition that didn't exist at the Taylor house, or it was due—I don't say this, but due—to something on the part of Mr. Hudson, how would we be bound? How would that be notice to us that the Taylor property was going to function? That is what he was trying to establish.

THE COURT: I understood that Mr. Bolotin said that the witness the other day testified, and I believe he did, to some similarity of the ground around there. That seems to me to indicate that this witness or any witness of this character should indicate whether there is this similarity of topography of the ground. I suppose that would have something to do with it, or the ground itself.

MR. BOLOTIN: That is correct, Your Honor. Mr. Weston, I think, mentioned some point several miles west of this area where this hard-pan exists. He gave the exact location, some place beyond Fort Belvoir, I think, and he said when he came into this area, Your Honor recalls, they made several punctures, 15 or 20, at various spots, and the soil was the same all over, and the situation was the same all over. This is merely corroborative of Mr. Weston's testimony in that respect. So, in addition to the notice, I think we can connect up the other factors to show that the situation being the same, and the difficulty being the same, then there is no reason why the defendants didn't know that the condition existed.

THE COURT: What question is pending now?

MR. HALPER: Did he make complaint to the Colonial Investment Company prior to March 5, 1948.

MR. BOLOTIN: Did he apprise them of that condition prior to March 5, 1948, and he was in the process of answering the question when Mr. Halper objected.

THE COURT: You may answer the question.

THE WITNESS: The answer is that I did apprise them verbally of this condition.

BY MR. BOLOTIN:

Q You didn't use the date, Mr. Hudson, that you apprized them. A Well, I stated that I had serious trouble within ten days after the date of February 6, 1948, and that it was on the day on which I had the trouble that I apprized the company, the Colonial Investment Company, about the situation.

179 Q That is about February 16? A That would be about February 16.

Q Did Colonial Investment take any steps at that time to remedy the situation? A Colonial Investment did take steps in that they put a dry well in about ten or twelve feet deep, out from my septic tank about 15 or 20 feet.

Q Was that all prior to March 5th, Mr. Hudson? A That was prior to March 5th. That was the first dry well that they put in. That did not correct the condition.

Q Mr. Hudson, are you familiar with the situation as it exists on Mr. Taylor's lot? A I am very familiar with that situation.

Q Can you please tell the Court, giving dates, what you have seen and what you have smelled, and what you have observed? A Well, I cannot specifically state dates during the period of time, but I know that throughout a twelve-month period immediately after Mr. Taylor moved in that he was having this condition whereby sewerage was permeating to the top of the ground, creating a smell, and that condition was not corrected by just merely the pumping of the septic tank—only temporarily until it refilled again. It was all through last summer that that condition existed.

180 Q Which summer are you referring to? A The summer of 1948 I am speaking of.

Q Have you had occasion to discuss this situation with Commander Badt or any other members of Colonial or Wellington? A I have not discussed it with Commander Badt, but I did with Mr. Taube of Colonial.

Q He is the president, right? A That's right. I visited Mr. Taube's office and sat down and drew out on a sheet of paper the plan, my idea of what needed to be done to correct the situation, and after doing that Colonial Investment did send a crew down and put the second dry well in the middle of my back lawn.

Q In this discussion with Mr. Taube, did you also include Mr. Taylor's condition? A I spoke of Mr. Taylor's condition and of Colonel Wilkins' condition, and of conditions that I had seen with my own eyes down on Bolling Road, from the standpoint of my fear of disease in the neighborhood.

Q Where is Bolling Road with reference to Washington Avenue? A Bolling Road is the second street down, I would say, probably about 1,000 feet from my house.

Q Are those Colonial houses there, also? A They are Colonial houses.

181 Q Have you had occasion in recent days or weeks to talk to Colonial and ask them about the situation out there? A I have not talked to Colonial in recent days or weeks, but I would like to say that I spent \$50 on last Monday morning, the fifth of this month, to have my septic tank pumped out and the lines cleaned out with a cutting machine.

Q Didn't you call Colonial about that condition? A I have not called Colonial about that yet.

Q Mr. Hudson, during the early part of '48 did Colonial indicate that they might or would correct this condition out there? A Well, they indicated to me that they would correct my situation with respect to my individual house in that they came back and put the second dry well in, which took care of the situation up until September 23 of this year.

Q Did you ever hear them make any promises with reference to Mr. Taylor's property during the early part of '48? A No, they never made any promises to me with respect to anyone else's property.

Q How about the general situation? A The general situation—Mr. Taube stated to me that they were working on the problem, that they knew the problem existed, they were working on it, they hoped to be able to correct it.

* * * *

182 BY MR. HALPER:

Q Mr. Hudson, what is your condition now?
A As I stated, it was only on the fifth, which was last Monday, that I had the backing up of my toilets in the house again, necessitating me calling in a company to pump out my septic tank.

Q That was the occasion when you paid \$50? A That's right. And then prior to that on September 23, 1949, I also paid out \$35 to have it pumped out. This is the second occasion that I have had to pump it out.

Q Has that pumping cured the condition from then to the present time? A The question is, what is present time. Sure, it cures it until the tank fills up again. I have seen with my own eyes that that tank fills up above the level which a septic tank is supposed to carry water. The waterline level of a septic tank is only supposed to come up so far before it is let out, and it fills above that level, thereby causing water to lay in the lines running to the fixtures in the house, at all times. So it is only by whatever force exists from flushing of the toilet that any of the residue is pushed out into the septic tank at all.

Q Pushed out of the septic tank from the lines? A From the toilet bowl when it is flushed, because
183 these lines are full at all times, due to the water level being at the top of the septic tank, pushing against the top of the septic tank, so actually you have got to have enough force to push out of your lines into the septic tank out of the septic tank into your drain fields.

Q And the pumping out of the fluid from the septic

tank cures that condition? A Sure it cures it for whatever length of time is necessary for it to fill up, and for the ground, depending upon whether the ground is wet or dry, or not, for it to be absorbent in the ground, whatsoever. If you had a very wet season at the time it was pumped out, I would assume the septic tank would function for thirty days or less.

Q And if the season were dry? A If the season were dry, it depends upon time. I mean, as I stated from dates that I have quoted, why, it might last as long as six months, and then again it might not last more than thirty days.

Q Do you know anything about Mr. Taylor's present condition with reference to these septic tank operations?

A I know that Mr. Taylor is still having trouble with it.

Q I mean of your own knowledge. A Why, sure I do.

184 Q Presently? A Yes, definitely so. There is still water permeating to the top of the ground in his yard where his septic tank is installed. We can still smell that whenever we get anywhere near it.

Q When did you last notice that? A I can't state the specific date when I last noticed it.

* * * *

Lieutenant Colonel Josef A. Prall

was called as a witness by the plaintiffs, and being first duly sworn, was examined and testified as follows:

* * * *

Q Where do you reside, Colonel? A At 38 Bolling Road, Wellington Park.

Q From whom did you purchase that home? A Colonial Investment Company.

185 Q Do you recall the date that you moved into the house? A Yes, sir, it was November 18, 1947.

Q Where are you located with reference to Mr. Tay-

lor's dwelling? A I am the second street approximately—my directions are just a bit off there—approximately southwest of where Mr. Taylor lives.

Q And as the crow flies how many feet or yards would that be? A I would estimate a thousand to 1,200 feet.

Q Did you experience any difficulty with your septic tank system prior to March 5, 1948?

MR. HALPER: Pardon me just a minute, Your Honor. I don't want to object every minute, but I think Your Honor sees the general range of my objections. I am not going to object as each question is put to this witness. My objection to that would be, first of all, these witnesses who own houses a thousand or more feet away are not involved in this controversy, and that any condition which exists with reference to their property or has existed is not indicative of any condition which exists at Mr. Taylor's property, unless it can be established by some relationship that the earth or the ground or the contour or the percolation qualities are common, and also that that condition existed at the time that 186 is critical in this case.

* * * *

187

Dorothy E. Taylor

was called as a witness by the plaintiffs, and being first duly sworn was examined and testified as follows:

Direct Examination

* * * *

Q * * * You are the wife of the co-plaintiff, Victor R. Taylor, is that correct? A Yes.

* * * *

Q It is your first venture into purchasing a home as Mrs. Taylor? A Yes.

188 Q When did you first notice the premises 390

Washington Avenue as being for sale? A About March 4, 1948.

Q How did that come to your notice? A There was an advertisement in the newspaper, a rather attractive one, advertising a rambler-type home, by Colonial Investment Company.

Q Then what did you do? A I called the Colonial Investment Company and made arrangements to see the home.

Q The advertisement referred to the specific area or location of the house? A Yes.

Q And that was the house on Washington Avenue? A I don't know if the picture or the advertisement was that specific house, but it was similar to all the forty houses which were put up in that area.

Q When did you first see this house that you eventually purchased, 390 Washington Avenue? A On March 5, 1948.

Q And how did you get out there? A Mr. Lewis, the salesman for the Colonial Investment Company, made an appointment to drive us, my husband and I,
189 out to see the house on March 5th, and he drove us out there.

Q You and Mr. Lewis and your husband saw the house on March 5th, is that correct? A Yes.

Q What time of the day or night was that? A It was during my husband's lunch hour, between the hours of twelve and two, probably.

Q How long did you stay out there inspecting the house? A Not long, because my husband didn't have much time, and it was very cold. I know that we couldn't go outdoors to inspect the outside because of the muddy conditions and the weather.

Q Was the house completed or still under construction? A It was still under construction.

Q How was the outside with reference to its being

finished or unfinished? A Very unfinished. There was nothing—

Q What stage of construction had the interior reached?

A Well, the floors were not finished, and Mr. Lewis said, of course, there were many things still to be done to make it right, and the way it would be when a person would move in. There was still much that would make it more attractive and better.

Q It hadn't been papered or painted yet, is
190 that correct? A They hadn't papered it, and the floors were unfinished.

Q Did Mr. Lewis make any specific representations as to how the house would be completed? A He said that it would be completed in a first-class condition, that everything would be just the way we'd want it, and the fine materials, it would be very nice, in a workmanlike and first-class condition.

Q Have you had previous experience with septic tank systems? A Yes.

Q Did you ever occupy a home previously where they had a septic tank? A I had a home in the West which had a septic tank system, or a system of that type.

Q Did you ask Mr. Taylor specifically about the sewage or water disposal systems of this house? A Yes, because I, having had a home in the West, and having had experience with a place with septic tanks, or some sort of a system which was not sewage, I just naturally asked if it was all right. My own experience had been all right in the West because I had a very fine contractor, and I know that when I built my home in 1937 that my
contractor had the home put on—even though the
191 soil there is a different type, much more porous, or finer soil, he still put the house on a high piece of ground and had one of his laborers dig down to find the water table, because he said that the water table—it was necessary to know at what height the water table is.

MR. HALPER. How are we bound by a Western enterprise of digging a well on a hill?

THE COURT: Are you making an objection?

MR. HALPER: Yes, Your Honor.

THE COURT: I sustain it.

BY MR. BOLOTIN:

Q Mrs. Taylor, coming back to this specific date, March 5th, what if anything did you ask Mr. Lewis about the sewage and water disposal systems on the premises you were about to purchase? A I asked them if they worked all right, because I remembered it is something that you should just have done right.

Q What did he say? A He said, "Oh, yes, don't have any trouble with it; they, all of them out here have them, all through this area, they are all septic tank systems; never have any trouble; maybe once in three to five years you might have to have it cleaned, but you will never have any trouble with it."

Q Did he specifically mention that others in the area were not having trouble? What did he say in that respect?

192 MR. HALPER: Oh, I know how to answer that question.

THE WITNESS: He said this, I recall very clearly—I said, "Mr. Lewis, you have told us all about the good things about the house, how modern it is, all the wonderful features about the house. You have said all the good points. What are the bad points? Because there might be some, and there usually are about almost any house."

He said, "I can't think of any." He said, "Oh, over in that corner over there, that southeast corner by that telephone pole there's a pool of water, but they are taking care of that. That's nothing."

BY MR. BOLOTIN:

Q Did he indicate to you it might have been something else besides just a pool of water? A No.

Q Did Mr. Lewis say anything or indicate anything to you that would—

MR. HALPER: Your Honor, I object. I think that in a conversation between these two parties the proper way to put the question is to have the witness exhaust her memory as to the conversation. But did he say this, or did he say that is nothing but leading the witness to the answer, and it certainly is objectionable as leading.

THE COURT: The question should be framed as not to indicate to the witness the answer.

* * * *

193 Q Mrs. Taylor, this contract for the purchase of the house was signed on March 5th, 1948, is that correct? A Yes.

Q You moved into the house on March 27, 1948, is that correct? A Yes.

Q Will you please tell the Court what if anything happened on March 27 with reference to the sewage or plumbing systems? A We moved in in the morning and arrived at the home. I was watching the time because we were paying a storage company by the hour. We hadn't been there in the house very long. The men were still moving the furniture in the house when my husband went into the bathroom and he came out and said the toilet won't flush. Then one of the neighbors who was in the house, or near, he asked about it, and the neighbor said the water isn't turned on, and he went in and turned something by the toilet and said, "Now it will be all right." My husband flushed the toilet and the water rose right to the surface of the bowl.

Q Then what did you do? A Well, it was a Saturday. I wanted to immediately call the company. I
194 was very upset about it, naturally, and the company—I believe it was Saturday and the offices were closed, so that night and all day Sunday we couldn't take a shower. We were very inconvenienced, to say the least.

Q Did the water continue to remain at that top level that Saturday and Sunday? A It may have gone down

very, very slowly. We were afraid to use the toilet because it was very evident that it would have gone over the floor had we done so.

Q What happened on Monday? A On Monday morning my husband called the Colonial Investment Company, and Mr. Levick came out in the morning, and Mr. Levick brought with him Mr. South. I understood at that time that Mr. South had put in the septic tank system; and Mr. Levick had Mr. South dig what they call a dry well on the north part of our property at the back.

Q Did they say anything in your presence which indicated they knew what the difficulty was? A Well, they said, "Don't worry, everything will be all right, we will fix it." And I was naturally very concerned, and Mr. Levick said, "It will be all right, we will make it right, we will make it work."

Q What did they do? Will you please proceed? A Mr. South and his men dug a dry well near the north boundary of our property and they said that that would take care of the situation.

195 Q Did it take care of the situation? A Only for a very short time.

Q What do you call a short time? A Well, I can't remember clearly. I believe it was a matter of only about three weeks or so. That was my impression.

Q What happened at the end of this three weeks? A After about three weeks, it could have been a little longer, the toilet began to show that the water would not go down as it should normally, and I became very concerned about it, and had my husband call the Colonial Investment Company. He called the company, and I didn't hear anything from them. I had him call again, I believe, and after a few days went by and still no answer, I believe that I called the Colonial Investment Company and spoke to Mr. Levin, and naturally complained about it, and wanted something done before the water spilled all over the floors.

Q What did he say? A Mr. Levin assured me that they would send someone out, and I believe he said that Mr. Levick or Mr. South would be out to see about it.

Q Did someone come out as a result of that conversation? A I think it was several days later Mr. Levick and Mr. South came out. They went into the bathroom.

Mr. Levick flushed the toilet and the water went
196 down. He said, "Well, I can't see anything wrong."

He said, "Have you been talking to Mrs. Hudson?"

I said, No, I was sure there was something wrong, because it was not acting as it should. He seemed to question what I said, so I just assured him that I was, that it was not acting as it should, that I was concerned about it, that if he wanted to wait until it overflows on the floor so he could see it, that would be all right. However, at that point he agreed to have Mr. South dig another well, and either that afternoon or the next day Mr. South and his workmen came out and began to dig the second well.

Mr. South asked me before they dug the second well—asked me where I would suggest that they dig it. I told him that he was the expert on those things and I didn't know, but would suggest that he try to put it in a place where it would work.

They dug the second well and connected that with one of the sewage lines or field, and I watched the sewage pour into it. At the same time, however, water which was not sewage, but which was underground water from a direction northwest—it looked, in fact, under the house, coming from a direction under the house—began pouring also into the dry well, and it began to fill up to the surface of the well.

Mr. South realized that it wouldn't work, because he and his men walked away and said that it was just
197 filling up, and went over to one of the neighbors' properties to continue their work there. One of

the neighbors near to the north was having similar trouble right at that time.

Q Did Mr. South tell you whether he could or could not correct the condition by digging these wells? A He indicated to me that he could go on digging them and digging them, but he said you could keep digging until the whole lot had wells in it, but he said he doubted that it would work, eventually. In fact, I heard him make the statement once, he said, "I don't think," meaning all through that section there—because the neighbors were also having trouble; I was discussing it with him—he said, "I don't think it will work, I don't think it will ever work."

Q Prior to the time that you signed this contract, Mrs. Taylor, was there anything in the kitchen which lent itself as an inducement to purchase the house? A Yes.

Q Rather, partial inducement—put it that way. A Well, a very great inducement. When we first went into the kitchen the Bendix seemed to be an attractive feature of it, because I thought I could save money by doing the laundry, myself, at home.

Q How was that Bendix fitted or built in the kitchen, could you tell us? A It is in the corner of the
198 kitchen right next to the counters.

Q And the kitchen is so designed, you mean, that the Bendix fits right in there? A It fits right in.

Q Did you continue to use that Bendix after you moved in? A I was afraid to use the Bendix. I haven't used it.

Q When you first moved in, I mean. A No, because when we first moved in and had all this trouble, I was afraid to put any more water in the system, in the tank. So I couldn't use the Bendix.

Q Coming back to the time that Mr. South dug those wells, about what month would you say that was, or what time of the year? A It was about the latter part of May or the first part of June. I recall that it was

dry, because I said to Mr. South, this is supposed to be the dry season right now, and if we are having trouble now, what will it be when we have rains.

Q Did your toilet and bathing facilities work normally after June, 1948? A Well, they have—the water has gone down in the toilet during the dry season, but I have not—I have been afraid to use the—I haven't used the

Bendix, I have been afraid to use as much water as
199 I would like to use in the house and as one would use normally for cleaning purposes, for instance. When I scrub the kitchen floor, instead of taking a bucket of water and throwing it down the toilet after I have scrubbed the floor, I go out and throw the water on the gravel driveway so that I won't put any additional water down the drains.

Q Did there come a time again in 1948 when you had serious difficulties with the septic tank system? A Yes, in the fall, about November.

Q When was that? A About November.

Q Will you tell the Court about those difficulties? A We had exactly the same situation as we had had in the spring. The water in the toilet came out right to the surface of the bowl and we couldn't use any of the facilities of the house as we should.

Q How long has that condition existed? A Well, it continued from the latter part of November right through February, as I recall.

Q What if anything was done to correct that condition? A Well, nothing was done to correct it except that Mr. Taylor called the company, and for a few times they, a man came, they sent a man out to drain the tank, and then we continued. After they refused to pay Mr.

Ashley, we had to, we couldn't leave the sewage
200 laying on the ground, and we had to continue living in the house. I remember very clearly on Christmas Eve we had trouble, and we couldn't ask guests, we couldn't ask any of our friends to see us on the holidays.

On New Year's day we had trouble, all through that season.

Q Did anybody else besides you and Mr. Taylor live in the house? A No.

Q Coming back to the early part of 1949, tell the Court what use you had of the dwelling, how long you stayed there, and what periods, and just what you did in reference to living there? A In March my husband went to Texas and to New Mexico. He was away approximately a month. When he returned we went to New York together, were there about ten days. The night we arrived home from New York I decided to leave for the West. Left the next day and returned in June. Then my husband and I both left about July 20th or 21st for the West. My husband returned in September, I returned the early part of October.

Q Was the condition, as you have described, about the toilet and bathing facilities any motivating factor in your remaining away from the house during these periods?

A Well, naturally, I didn't—I was always worried about the conditions and the fact that it was so unsanitary. It

made our living there very inconvenient and difficult. I was worried about the fact that there might be many germs around the place because of the sewage conditions, and I just naturally preferred to stay away as much as I possibly could.

Q As of now, as of today, Mrs. Taylor, are you satisfied or apprehensive about the use of the toilet and bathing facilities? A I am always apprehensive about it.

Q Your husband testified this morning about certain exterior improvements, primarily shrubs and bushes, and so forth. Did you participate in installing those improvements? A Yes, I did. I worked very hard in the garden from the time that we bought the house, and was most interested in making it attractive, and buying the very best shrubs that we could buy. I called a very good landscape architect and tried to plan the garden and

the planting so that it would be attractive and with the best quality shrubs and trees that I could get.

Q You heard your husband testify this morning about the expenditure of certain monies for these exterior improvements. Without going into too much detail, is it your testimony that they are approximately correct? A I know they are.

Q The amount and the dates and purchases? A Yes.

202 Q That is your best recollection? A Yes.

Q What can you tell us about the flooring or other conditions in the interior of the house? A The flooring has been most unsatisfactory. It started to swell—one section of the living room and front hall floor—in the summer of 1948; began to swell, and we had a ridge approximately seven inches high all the way from the wall in the hallway to the other wall in the living room, the north wall of the living room. The cracks developed all through the floor in every room, and the filling in between the parquet, the sections of the wood, filling, would come out and leave wide spaces between each square.

We had troubles with the furnace, also. I was assured by Mr. Lewis, the salesman, when I asked him about the furnace being in the kitchen—naturally, I wanted to have the kitchen always clean, and I was a little concerned about having a furnace in, near a refrigerator and stove and cupboards. He said, "Oh, that's air-tight, you will never have any trouble with that, and it will be very inexpensive to operate, also." He said that one of the houses that had the same type of furnace, in the same development, one of the men had only paid about \$80 for the year for his heat. I soon found that we'd have trouble repeatedly, it seemed, with the furnace. Something would be wrong, and there would
203 be oily soot in the kitchen then on top of the refrigerator, on top of the stove, and it was most

discouraging to try and keep the kitchen clean as I wanted it with this black, oily soot getting over it every time something went wrong with the furnace.

Also, the furnace used a great deal of oil and was not economical to operate. It costs approximately—I counted up the bills from the oil company, and it had cost us around \$300, or, as I figured some time ago, breaking it down to months, an average of winter and summer about \$15 a month for heat.

Q In so far as you know, Mrs. Taylor, was there any use made of the toilet or bathing facilities other than the purposes for which they were constructed? A No.

* * * *

Cross Examination

BY MR. HALPER:

Q Mrs. Taylor, do you have a nursery in the back of your house? Is there a lady there keeps a nursery? A I have a cutting garden.

Q No, I don't mean a plant nursery, I mean children.

MR. BOLOTIN: You asked her whether she has it.

MR. HALPER: Did I? I am sorry.

BY MR. HALPER:

204 Q Is there a nursery conducted by some person in the rear of your property, in the house back there? A I don't know. There may be.

Q A lot of children there? A I have not seen a lot of children, no.

Q You have not? A I have not.

Q Mrs. Taylor, when you first talked to Mr. Lewis about the septic tank, of course, as you have stated you have had some experiences with septic tanks out in the West? A Yes.

Q You knew something about them, as you said. A I knew that the contractor was interested in finding where the water table was.

Q And when you came to talk to Mr. Lewis, you knew about the water table—had you ever heard of dry wells?

A No.

Q Had never heard of that? A No.

Q And when Mr. Levick and Mr. South proposed putting in a dry well, did you know at the time why that was done? A I didn't understand all about that.

Q Did that indicate to you that something was wrong with the entire system as distinguished from some defect that might be remedied or cured, like a leaky pipe
205 or something like that? A I didn't understand much about it. I just took it for granted that when Mr. Levick made the statement that they would make it work, that everything would be all right. I didn't question more.

Q When did you first determine in your mind that there was something wrong with the system? A Well, I don't know. I didn't know enough about the system itself.

Q Until when? A To know just exactly what was wrong, because I do not know a great deal about—I mean, I have never dug into the ground, and I don't know the details about the sewage systems, of course.

Q I understand that, but when did you first have a warning of something that was wrong? A The day we moved into the house I knew that the toilet wasn't working correctly, and naturally, I was worried, but every time that I became worried, and every time we had trouble, Mr. Levick or someone, agent of the Colonial Investment Company, would assure us that they would make it right, and that everything would be all right.

Q That is a long answer to a short question. I just merely asked you when did you first have warning. You
206 said when you moved in. All right, that answers that. When did you first have a warning in your mind that there was something wrong with the system, if you did? A When Mr. South dug the second well.

Q What was the date of that? A I don't know the date.

Q Let's see— A It was approximately the latter part of May, or the first part of June.

Q As I recall your testimony, they came out about ten days after you moved in, the first time. A The first time they came out was the Monday after we moved in, because approximately a half an hour after we moved into the house we had trouble, so the next Monday morning they came out.

Q On that occasion they undertook to dig the first well? A The first well.

Q And that was the time that one of them said everything will be all right, we will make it right? A Yes.

Q Then I think you said that three weeks later the toilet began to show that the water would not settle. A The water was not going down as it should normally.

Q And you called and spoke to Mr. Levin, and then that was the occasion that South began to dig the
207 second dry well? A Yes.

Q Then we would say that within a month after you moved in the second well was dug? A I am not certain of the dates.

Q Approximately? A It was within approximately that.

Q I am trying to fix this time according to your own testimony. You came in and flushed the toilet immediately; about ten days later they came out, and three weeks later they came out for the second well again. A The day we moved in it didn't work, they came out the next Monday morning. That was two days later. Then about a month later they dug the second well.

Q Very well. That brings it within that period of at least six weeks. When Mr. South dug the second well you came to the conclusion that there was something wrong with the system, is that right?

* * * *

THE WITNESS: Mr. South seemed rather—and his men rather concerned themselves when they saw the water filling up in the second well, but they said they would dig another, and that that might work, and they did dig another well.

Q And when Mr. South and his men became concerned about the water backing up, that was evidence that
208 there was something wrong with the system? A No, that was evidence that they had struck underground water.

Q Well, does the striking of underground water show, or did that indicate to you that there was something wrong with the system? A That wasn't the system. The underground water came from under the house, not from where the septic tank system was.

Q Mrs. Taylor, did you say a minute ago that when South dug the second well you became convinced, or words to that effect, that there was something wrong with the system? Was that your statement? A No, I don't believe so.

Q You mean you didn't just say that? I asked you what was the first indication to you that there was something wrong with the system. Didn't you say when Mr. South dug the second well? A No, not that I recall. There was something wrong with the second well, because it filled with water.

Q I asked you about the digging of the second well, at the time of the digging of the second well, isn't that the time that you felt there was something wrong with the system? A No. I didn't know anything about the system. I knew there was something wrong with
209 that one well, because it filled up with water, and Mr. South went up to the neighbor's property, because it was filling up. He said, "We can't do any more work today, that is just filling up, we will have to leave it." They went up north—I think it was the Hudson's property, on which they were having trouble that same

day, and they went back there to continue their work up there.

Q Let's come back to your property, Mrs. Taylor.

* * * *

Q Mrs. Taylor, when did you next meet with a condition there that led you to think something was
210 wrong with the system? A I didn't know anything about the system. You mean at the time we dug the second well?

Q Yes, ma'am, beyond that time. Let me put the question this way: When did you next meet with the condition that led you to believe, if it did lead you to believe, that something was wrong with something? A Well, we had trouble in the fall of 1948.

Q Would that be about September? A About November. And I had not used my Bendix. I was being very careful about water, but in spite of the fact that I was very careful about it, we still in November had the same type of trouble.

Q What was the condition between the time of the second well, which I place, according to your testimony, about the middle of April— A The second well, as I recall, was about the latter part of May or the first of June.

Q And what were the conditions you met between June and November? A The weather was very dry. I did not use the Bendix and we had no trouble about the water coming to the surface of the bowl again.

Q When did you have the condition of seepage out in the yard where the distribution fields are, and the odors?

A Of course, there has always been, even though
211 we didn't have trouble inside the house, the ground in the back of the house, there are sections of it where it's always seemed, it seems damp. And I feel that the sewage, or think that the sewage has seeped through in portions of the field. For instance, I never, when I go out in the back, I will never wear the same

shoes that I wear out there. I always take those shoes off in the garage and leave them in the garage so that I won't track germs or anything in the house after I have been out in the back yard, because I feel that even though the weather is perhaps dry and we are not having any great trouble at the moment in the house, the damp conditions and the fact that we have had sewage in spots, makes it unsanitary in various sections of that field.

Q That was continuous from May to November? A We have always had it.

Q Always had it. Now, that's the answer. A In sections.

Q In sections? A Parts of the area.

Q And that condition arose from time to time but in more or less continuous fashion from May until November, is that right? A Well, in November is when we had sewage trouble inside the house, and it was worse outside.

Q I didn't ask you about November. We
212 stopped at November. From May to November, over that period of time, did you have this continuous seepage in parts of the area, and at different times? A I think so.

* * * *

214

Willis A. Wood

was called as a witness by the defendants, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

Q What is your business? A I am an employee of the United States Weather Bureau.

Q Are you presently employed? A Yes.

Q What is the nature of your employment? A I have charge of compiling and publishing climatological data for Washington and vicinity.

Q Data of what? A Temperatures, rainfall, and related weather conditions.

Q And, as such, do you make records of these
215 various conditions for that territory? Do you make permanent records? A Yes, we do.

Q Having made the record, does it become the official record of the United States Weather Bureau? A Yes.

MR. BOLOTIN: If the Court please, if this man has official copies of the Weather Bureau publications, they are admissible. I am not going to contest them. I would just like to look at them.

MR. HALPER: I think I had better ask the witness what they are.

MR. BOLOTIN: I will admit they are official records.

THE COURT: Mr. Halper, suppose you ask him what it is that you want to show.

BY MR. HALPER:

Q Mr. Wood, have you brought in response to a subpoena a duces tecum the records of the United States Weather Bureau showing the amount of rainfall for the year 1948 in the territory near Alexandria, Virginia? A Yes.

Q Have you brought those records? A Yes, I have.

Q Have you also brought comparative records of rainfall for preceding years up to the year of the equivalent rainfall.

* * * *

217 Q Mr. Wood, how do you measure rainfall, according to your records? What is the unit of measurement? A The unit of measurement is 1/100 of an inch.

Q Will you tell how many units of rainfall you had in 1948? A At Alexandria, Virginia, the Potomac Yard Station showed 57.28 inches. We also have a station at Episcopal High School, a suburb of Alexandria, having 58.33 inches.

Q Incidentally, is that an average for the year? A That's the total for the twelve monthly measurements.

* * * *

Q In what preceding year did you have as high
218 as that? A In making comparison, I feel I should make an explanation of the basis of comparison. The records for Alexandria are rather fragmentary. We do have a record showing a higher amount in the year 1889.

* * * *

Q Would you say from that that between the year 1889 and 1948 there was not a year higher than the year 1948? A In order to adequately answer that, it would be necessary to refer to the records for Washington, D. C., which are more complete than those for Alexandria. The record for Washington, D. C., does show that there were no years between 1889 and 1948 having as large an amount as was recorded on those two years.

Q Mr. Wood, can you break down that 1948 rainfall by months? A Yes, I have monthly amounts.

Q Will you state that, please? A For Alexandria, Potomac Yard Station, January, 3.40; for February, 2.20; March, 3.49; April, 3.74; May, 9.20; June, 4.68; July, 3.95; August, 8.31; September, 3.20; October, 2.79; November, 5.75; December, 4.57.

For the Episcopal High School Station: January, 4.60; February, 2.20—pardon me, I'll have to correct that
219 —2.02 for February; March, 3.63; April, 3.38; May, 9.29; June, 5.12; July, 4.67; August, 8.09; September, 3.42; October, 3.45; November, 5.80; December, 4.86.

* * * *

Cross Examination

* * * *

222 Q Do you have the 1947 records with you for Washington? A Yes, I have those. The monthly amounts are given on page 1.

Q The totals are in the first column? A The monthly totals, yes.

Q The normal would be the same? A The normal is the same, that is correct.

Q Then the total for Washington for 1947, according to this sheet, is 40.39, is that correct? A That is correct.

Q Would you happen to have the total for Alexandria or Fairfax for 1947? A I have here the Virginia section of climatological data which contains what information is available for Alexandria. I am sorry there are no data for Alexandria published in this form.

Q You have no totals for '47, then? A There is no publication giving the annual amount for Alexandria for 1947.

Q Did you tell us what the total was for Washington, D. C., for 1948? Do you need these records to tell us that? A I do not believe I gave that. The
223 amount was 56.41.

MR. HALPER: What is that figure for?

THE WITNESS: 1948 total for Washington, D. C.

BY MR. BOLOTIN.

Q Is it at all unusual to have a variance in readings between stations which are located as close together as the Washington and Fairfax stations are located? A Would you define the word "variance" as used in that question?

Q Well, any variance in the period of a month, say, variance from a fraction of an inch to a variance of an inch or two inches? A It's not unusual to have a variance. In fact, it would be unusual not to have variance.

Q It would be unusual not to have a variance. So that taking any given month you might have X inches in Alexandria or Fairfax, and X plus an additional amount, or less amount two or three or five miles away, is that correct? A That's correct.

Q The point I am driving at—you have given area here. The fact that rainfall measures X inches in this part here would be no indication of the rainfall in an adjacent area anywhere from two to five miles away, isn't that correct? A I am sorry, I do not believe I should answer this type of question, Your Honor. There
 224 is a definite indication in the values that we have given of what could be expected in an adjacent section.

I feel that the cross question is unfair to the witness to try to make a definite statement of something that isn't a matter of record.

* * * *

226 BY MR. BOLOTIN:

Q The next question I have is this: Since you have no normals for Alexandria, I will use the Washington charts which you produced for Mr. Halper.

The January chart for Washington shows total 4.99. I have already given you these figures, Your Honor. This is just repetition.

The normal is 3.55. By subtracting, that is roughly a difference of an inch and a half, is that correct? A The departure is also shown here as 1.44.

Q Oh, I see, that is the difference. This differ-
 227 ence of 1.44 spread out over a period of 31 days, would that constitute a catastrophic difference to create floods, and so forth? Could you answer that question? A No, that would not.

Q That would be hardly even what you term a drop in the bucket, is that right, a difference of 1.44 spread over 31 days? A That is not an unusual departure.

Q It is not an unusual margin? A No.

Q My point is this, that that would over 31 days, hardly be even noticeable, spreading it out over 31 days, isn't that a fact?

THE COURT: He has answered that.

BY MR. BOLOTIN:

Q Coming down to February, we have a departure of 1.32. Is your answer the same on that, that wouldn't be considered out of order? A That's right.

Q I notice the two I had had a minus in front of the figures, and this has a plus. What does that indicate?

A The plus indicates that there was more rainfall than normal; the minus indicates less rainfall than normal.

Q I am sorry. So that I had my questions reversed.

For January and February, 1948, there was less
228 rainfall than normal, and those departures which

I gave would indicate that it wasn't out of the ordinary, is that right? A I am sorry, these data are in error. The published value shows a minus. It should be a plus.

Q Those two are in error, is that right? A The January is in error. The February is correct.

Q Will you change the January one, then?

(The witness did as instructed.)

Q Coming to March, '48, the departure of 1.58 would not be considered out of the ordinary, isn't that correct?

A That is correct.

Q April, 1948, departure of 0.85, is that correct? A Yes, that's correct.

Q So that in April the departure was even less than the preceding months, less in inches, is that right? A Yes.

Q That wouldn't be out of order either, would it? A Right.

Q How about May, departure in May was 5.74? A That is a rather unusual departure.

Q In what respect is it an unusual departure? A That is an unusually large amount of departure.

Q What would be considered a usual amount of departure? A The Weather Bureau does not make averages of departures. I am afraid I couldn't answer that type of question.

229 Q What makes you say that one is usual and the other is unusual? What do you base your answer on? A I was making comparison with what we have had in previous years for those months. It so happens that the amount of departure there in May is the greatest we had since 1889 for May.

Q Would that five inch departure spread over 31 days be of a flood type of departure? A I am not aware of any floods having occurred. I can't answer that question. That is not a part of the evidence that I have presented.

Q Well, five inches spread over 31 days, would that constitute a serious condition, or something that is not too far from the usual condition? A It is an unusual condition.

Q I think we both made an error. Those figures I am giving you appear to be cumulative since January first. Look at that and see if I am not correct? A We have on there below the monthly amount an accumulation. They are both given.

Q Which have I been reading? A You have been reading the monthly departures, I believe. That is my understanding.

Q I have been reading a cumulative. Coming back to May, then, total departure for the five months,
230 January, February, March, April, and May was five inches, is that correct? A Yes, you are correct.

Q So I was wrong when I said that five inches were for the month of May. I was in error before, isn't that right? A That's right.

Q Five inches is for the five months? A That's correct.

Q And in June, 1948, the total departure for June was 0.15, is that correct? A That is correct.

Q You might consider that normal for June, isn't that right? A That's near normal.

Q And for July, we have 1.11, which you might consider pretty close to normal, is that right? A Yes.

Q Now, August we have 3.99. Would that be a big departure from normal; over 31 days, would you consider that pretty close to normal? A That is still an unusual departure.

Q 3.99 would be unusual? A Yes.

Q September we have less than normal, is that
231 right? A That's right.

* * *

Q So that in June the rain was—in June it was 0.15 less than normal? A That is correct.

Q And July was 1.11 less than normal, is that right?
A That's right.

* * *

Q In August, we have 3.99 greater than normal? I am right now? A That's correct.

Q And you say that is a slight departure from—
232 MR. HALPER: He said it was unusual.

MR. BOLOTIN: Unusual, but still it wasn't of catastrophic proportions, is that right? It wouldn't be sufficient to create—

MR. HALPER: Noah's flood.

BY MR. BOLOTIN:

Q Flooding of bridges and things of that sort? A
(No answer.)

Q You tell us about September of 1948? A That's plus thirty-nine hundredths. That is above normal.

Q Plus thirty-nine hundredths, more than normal? A
That's right.

Q That's not an unusual departure? A No.

Q October? A Plus .27.

Q More than normal? A That's more than normal.

Q And that wouldn't be an unusual departure, correct? A No.

* * *

233

Redirect Examination

* * * *

Q * * * You were asked whether in your opinion there was some precipitation and some not in the same territory, not too far removed from each other.

Your records are average records, are they not, for the years? A The normal is an average for years. The others are accumulated totals for months and years.

Q Now, then, it is perfectly possible, taking this Wellington subdivision and the Alexandria station, which are removed from each other some few miles, it is perfectly possible at a given time that there may be rainfall at Wellington and none at the station, and vice versa? A That is correct.

Q So that takes care of the average, is that
234 right? A Yes.

* * * *

Dr. Henry C. Bradford

was called as a witness by the defendants, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

Q First of all, what is your business or profession?
A I am a physician.

* * * *

Q And you are now what? A I am now the health officer of Fairfax County.

235 Q How long have you been engaged in that capacity? A Since November first—October 15, 1946.

Q What are your duties, and in answering this question, also state whether your duties changed during this period.

My question is directed to the entire period. What were your duties as County Health Officer generally? A My duty as County Health Officer is principally administrative, in administering the various functions of the Health Office, which consists of various departments—sanitation, nursing, and so forth, and our various clinics.

* * * *

Q Are you engaged, or do your duties call for the supervision of the installation of septic tanks? A Not direct supervision. We have in the County of Fairfax—we have at the present time five sanitation officers who are trained by the State of Virginia and assigned to the County of Fairfax.

I might say that the Health Department of Fairfax County is set up by the State of Virginia, and there is a certain degree of autonomy in the operation or the
236 functioning of a County Health Office. We function or operate under the laws, the regulations, or rules enacted by the County, although we follow the policies of the State of Virginia.

Q Does the State of Virginia direct you in that connection, or do they command you? In other words, do you follow your own rules and regulations, or do you have rules and regulations prescribed by the State that you follow, or do they simply advise you? A They are principally advisory.

Q I see, that's the answer. Doctor, in 1947 did you have some transactions with the Colonial Investment Company or the Wellington Park Estates? A In the year 1947?

Q Yes. A Yes, our records do show that our office did have transactions with the Colonial Investment Corporation.

Q I want to show you this letter and ask you if it bears your signature and if you wrote that letter and sent it to the Colonial Investment Company on the date indicated? A This is my signature.

Q Would you read that letter, Doctor, please?

* * * *

238 Q Doctor, this letter addressed to the Colonial Investment Company, and reading, "In response to your communications and requests to this office—" you did get communications and requests? A Did I what, sir?

Q The letter, addressed to Colonial Investment Company, states:

239 "In response to your communications and requests to this office regarding Federal Housing Administration request in connection with our approval of use of individual sewage disposal systems in Wellington Park subdivision—" you did get such letter and request? A I don't remember whether I did get the letter, because it has been so long ago, and I write so many letters, and receive so many, but the very fact that I wrote the letter in that style and that phraseology, and everything, there is no chance that I did not get it. I must have gotten it.

Q If you got it or not, nevertheless, you went on to say:

"Wish to advise that private septic tank sewage disposal systems, if laid out in accordance with current requirements and installed under specifications of the Fairfax County Health Department will be approved."

You said that to Colonial Investment Company? A (Nodded affirmatively.)

Q All right. That was March, 1947. Following that letter, were permits issued by your office to the Colonial Investment Company, or to some individuals, builders, and so forth, representing the company, to go forward with such type of work?

* * * *

240 Q Doctor, would this be a true copy of the permit that was issued subsequently for the in-

stallation of these septic tanks? A I think it would. This has Mr. Baker's name on it, and it looks very much like a copy of our permit blank and our permit.

* * * *

241 Q Doctor, did you ever visit the premises prior to the time that this work started? A Prior to the installation of the septic tank?

Q Well, prior to the building of the buildings? A No.

Q Did anyone from your office visit the site? A I don't know personally the dates of the visits of our sanitation officer assigned to that district to that—the dates of his visits, whether they were prior, but I presume they were prior, because this permit was issued for the construction or the installation of a septic tank, I think, in Mr. Taylor's instance, I think, in July of 1947, and I don't think that at that particular home, the construction was completed at that time.

Q Is Mr. Harold D. Baker, the man who signed this—is he one of your sanitation officers? A He is
242 one of the sanitation officers.

Q And he would have more knowledge of that than you? A He does.

Q Coming back to this Virginia State Sanitation Commission, you stated a moment ago that they were merely advisory, and that you were not required under your rules and regulations to follow any dictates or any commands from them as to the installation of these septic tanks, is that correct? A I expect I will have to modify that a little bit. It's not entirely advisory. In fact, I would hesitate not to follow out any suggestion that the State Health Department gave me.

Q Doctor, let me ask you this question. Before you commenced, or before you issued permits to install these tanks, were you required to consult the Virginia State Commission? A No.

Q In any respect, with regard to the nature and character of the installation, or the type of installation, or the type of material, were you required to do that? A No, we have all of that in our own office, and that's just a customary or regular way of going through with that type of work. We have all those specifications. The officers know just what is required, and that information is carried on to the contractor or the constructor of
243 the septic tank.

Q And that was done in this case? A That was evidently done in this case.

Q And that, of course, Mr. Baker supervised? A By Mr. Baker, the sanitation officer assigned to that particular area.

Q So that your procedure as the Health Officer, in permitting the installation of these tanks, was not counter to any prescription of the Virginia State Commission, but rather followed their prescriptions, isn't that right? A Yes, that's exactly correct.

Q Now, then, you heard Mr. Weston, the sanitation officer of the Virginia State Commission, testify. You heard him testify here yesterday, did you not? A Yes.

Q Is he correct in saying that these installations did not follow their prescribed method, and so forth? A I heard Mr. Weston testify, or, rather, the evidence that he gave, which covered the inspection that he made some time in October of 1948, but the question that you asked me at first was, were these instructions to the contractor or in the construction of this septic tank, were they counter to any instructions from Richmond?

Q That's right. A I assume, as the Health Officer, in sending a sanitation officer out to do a certain job or a certain work, or to issue the issuance
244 of a certain permit, or lay out for a septic tank installation, that he does that according to the specifications that we have in our office that are issued by the State.

Q And in this case— A And in this case I have no reason to believe otherwise.

Q You have no reason to believe that you didn't follow the instructions? A Whether that septic tank was put in according to those instructions that Mr. Baker gave, I do not know.

* * * *

THE WITNESS: It may not have been necessary to make more than even two visits. We can give a person a layout for the construction of a septic tank, and the person who is putting in the septic tank is supposed to know something about it. Otherwise, he shouldn't
245 be in the business, and it is not necessary for the sanitation officer in many instances to even go back to that area, or to that site until the septic tank has been put in and completed.

We require that the system not be covered so that the necessary inspection can be made to see that it does comply with specifications.

Q Then, as far as you know, the installation in this case of Mr. Taylor was permitted by your office, and was actually inspected, and followed the prescribed method of the Virginia State Sanitary Commission, is that right? A I, as a Health Officer, assume that.

Q At least, it is your duty to see that that is done, too, is it not?

* * * *

BY MR. HALPER:

Q How much experience do you have with septic tanks, Doctor? A Well, I'm certainly not an expert in the construction of septic tanks, but I believe my first experience with septic tanks was when I was at-
246 tending the—let's see, the Medical Field Service School in Carlisle, Pennsylvania, in 1921, but I dare say I have completely forgotten everything I studied there, because septic tanks were of no interest to me at that time, except to retain it—what I had learned, or

what was attempted to be taught me during that time, in order to pass the examination.

I have had some experience in the past three years. I think I know something about the functioning of septic tanks, and the installation, and construction, and material, and various other things pertaining to them.

In other words, I would have to possess that knowledge in order to be the Health Officer of a County in which the functions of septic tank installation construction are carried on.

Q Then you do state that you have informed yourself as to how a septic tank operates, how it is constructed, and how it operates, is that right? A Yes.

Q Then you are an expert witness.

Now, Doctor, I want to ask you this: Will you explain to the Court how this septic tank at the Taylor residence operates? A The functioning of a septic tank—a septic tank is a receptacle in which any septic action occurs. This particular type of septic tank—a septic tank is put in not as a receptacle to hold sewage material until it has filled and then empty it. That is erroneous.

A septic tank is a rather highly technical procedure, although it's simple in operation. We take for granted some of these highly technical things, because they operate so easily, but a septic tank, for instance, I think the one in Mr. Taylor's residence, the capacity is about a thousand gallons.

Well, it only takes—if they have three people in the family, we figure that a person uses about fifty gallons of water a day. That would be three persons, one hundred fifty gallons a day.

It would only take six days to practically fill that septic tank, and, as a matter of fact, the septic tank, after it has filled, begins to function properly.

Q Now, let's go from the house to the septic tank.

First of all, you have a pipe? A Have a pipe, a sewer line.

Q How many feet from the house? A That is something like five feet, or ten feet, or even more, from the house.

Q The first receptacle that the stuff enters is this tank, is that right? A That goes into an inlet into the tank.

Q How deep is that tank, as a rule? A A thousand gallon tank is about $8 \times 5 \times 4$.

258 Q How many feet below the ground should it be to properly function? A Well, it should be, say, possibly, oh, within a foot of the surface of the ground.

Q Did you hear Mr. Weston say that this was too deep? Or did he speak of the distribution field? A If I correctly remember, I think he said something like three to six feet in the ground. I don't know whether he was speaking of it from the upper surface of the tank. I presume he was, from the upper surface of the tank to the surface of the ground overlying the tank.

Q Did you have anything to say about his statement that that was an improper depth in this case? A Well, I would feel that was a little deep.

Q And how many feet is this? Do you know? A That Mr. Taylor's tank is?

Q Yes. A I don't know.

* * * *

Q Now, Doctor, we got to the tank, and all the waste material goes to that tank from the sewer line. Incidentally, waste water is included, of course, in the
249 sewage, and it also includes fats and oils and soap and hair and whatnot, does it not, and very solid matters, isn't that so? A (Nodded affirmatively.)

Q When all that material enters the tank, as you stated, the tank isn't designed merely to receive it. What

happens to the stuff? What happens to the solid matter?

A This action that takes place in the septic tanks is a breaking down of it, or a disintegration of the solids, and the liquefaction. And it is a decomposition.

Q Do you mean by that, germ action, microbe action?

A Yes, it is a septic tank. It is a bacterial action that takes place in the tank. The sewage that enters, of course—a septic tank does not break down wood or cotton. It does break down paper and fecal material, and as the sewage enters the septic tank, that flow is broken by a baffle or a weir.

In our septic tank construction, that flow is usually broken by a "T". It enters and strikes against that "T" and then comes down. The flow doesn't go directly across the septic tank. If it did, you would get no bacterial action, and you wouldn't break down these solids.

And these solids, when they enter, they strike that baffle. The flow is slowed so that the solids, the settleable solids, settle to the bottom, and the flowing solids to the top. The bottom is called sludge, and at the
250 top it is called scum.

Q The scum then flows through the outlet? A The scum remains, and also the sludge remains. The sludge remains at the bottom, and the scum remains at the top, and we have to have what we call a detention period.

This fluid has to remain in the septic tank, and septic tanks are designed as to capacity in order to service certain size houses. In other words, if you had twelve people, you would have to have a fairly large size septic tank, and three persons—well, say we compute that on the number of bedrooms, in a three bedroom house we require a 720 gallon tank; two bedrooms, 450 gallons, and then a thousand.

Well, we have been asking many times to put in a thousand gallon tank, but the size of the tank is deter-

mined by the length of the detention period for that bacterial action to take place. That will vary from one to twenty-four hours. Ordinarily it is about two to eight, say, about eight hours is the usual detention period that this is supposed to remain.

Q What is it that flows through the outlet and out into the field? A That is a liquid, but that's a very foul liquid that flows and may contain pathogenic organisms.

* * * *

251 THE WITNESS: Pathogenic organisms.

BY MR. HALPER:

Q Now, Doctor, that stuff then flows out into the yard and into the area? A Into the purification field.

Q You call it a purification field. Does that mean that that fluid enters the earth and becomes absorbed in it? A After you leave the septic tank, then we go to a distribution box. For several years we weren't using distribution boxes. And I think—well, I'm sure Mr. Taylor's—the type in his house did not have a distribution box, but anyway, that goes out to different lines.

We require about three hundred feet of this drain line, which is called purification field. Sometimes that is set up into five lines, of sixty feet; or six lines of fifty feet; or three lines of a hundred feet, just to make the three hundred feet.

Q I notice in this permit that you issued you required a distribution field of three hundred feet? A Three hundred feet. Well, in this type that has four lines of fifty feet, and four coming across, that's four lines of fifty, two hundred, and fifty across makes three hundred.

Q You say, inches of cinders and stone—you
252 say 16 inches of cinders. So you also prescribe the cinders that go into this field. That acts as a filter, does it not? A Yes, it does. It dissipates the fluid. The depths for the purification field are approximately thirty inches deep, and then about eight inches of

cinders or washed gravel or crushed rock are placed on the bottom, or placed in the trenches, about eight inches, and then the tile is laid on those, eight inches, and that makes about four, a little bit more than four.

Those tile lines are four-inch pipes. And then if you add to that the thickness, it makes about a half or three-quarters of another inch, so it makes four or five more inches, and you put on about four more inches, of anywhere from two to four inches of cinders or crushed rock.

Q What is the purpose and what is the effect of a dry well? A Well, the effect of a dry well is to take care of an overflow of possibly a poorly functioning purification field.

Q I see, that is to relieve the pressure on the purification field, is that right? A Yes.

Q And take the overflow, one well would do that, and two wells would serve to a better purpose, and three also, is that right? You heard the testimony that that was done by Colonial in Mr. Taylor's case, is that right?

253 A Yes.

Q How often do you pump out the tank, and what is the purpose of that? What do you pump out then? Do I understand you to say that the solids that enter the tank are disintegrated and become liquid? Is that right? A (Nodded affirmatively:)

Q And the sewage, or ill-smelling matter goes out into the distribution field. What remains in the tank to be pumped out? A The sludge at the bottom and the scum at the top, and whenever the sludge occupies a capacity of the tank of more than twenty-five percent, then it's necessary to pump out your tank, and if it occupies a capacity of more than that, very much more than that, it interferes with the flow of the sewage through the tank.

That is the action that takes place. For instance, it takes about, let me see, about a million gallons going through a tank, you would get about, if I am correct,

about seventy cubic feet of solid material in the tank—seventy cubic feet in a thousand gallon tank, $8 \times 4 \times 5$ would be 160 cubic feet. That would be almost half full.

But say in a thousand gallon tank, if we had, say, possibly, if you had forty or fifty cubic feet of solid material—that is, of sludge—then it would be necessary to empty that tank.

254 But along that line, say, with 150 gallons a day put into a tank by three persons, a thousand gallon tank would take, that would be four thousand five hundred, I believe, gallons in a month's time, and twelve times that would carry it up to about fifty-two thousand gallons a year, so it won't be necessary to empty a septic tank for, say, about nine years, or seven, eight years, somewhere along in there. I can't figure that all quickly in my mind.

Q What effect does excessive use of water have on the operation of a septic tank—washing and bathing? A It would make it difficult for a tank to function properly, because it wouldn't permit the material to remain in the septic tank for the proper detention period.

In order for this material that goes into the tank to disintegrate and liquefy, it has to remain in there long enough during that detention period—that detention period has to be long enough.

If you take a thousand gallon tank and empty into it, say, a thousand gallons, why you'd disrupt the proper function of the tank.

Q What effect does excessive rainfall or excessive saturation of the earth with water have upon the operation of the system? A Well, that would prevent the water in the purification field from being ab-
255 sorbed into the earth, if the water table were very high.

Q Doctor, there was some evidence here, the evidence about percolation tests. What do you know about percolation tests in connection with this property, with the

Taylor property? A Well, according to our records, percolation tests were not taken prior to the construction of the septic tank, and it was not customary at that time for us to make percolation tests.

Q You didn't require the applicant for this permit, Colonial Investment Company, to make a percolation test, did you? A Percolation tests are not infallible.

Q In other words, they wouldn't altogether solve the problem, would they? A No, we take percolation tests. Now, this FHA, they require many percolation tests, but a percolation test is not an infallible test.

Sometimes you can get a very favorable percolation test and still your septic tank not function so favorably.

Q Nevertheless, you didn't require Colonial to make it? A It was not required, because it was not customary.

Q Doctor, do you happen to know approximately how many houses in the vicinity of the Wellington subdivision are served by septic tanks? A No, I don't. They are all houses there—I think there is a Veterans' Administration down a little further south, I think on that road from the United States highway to the Mount Vernon estate, that has some, I imagine they are functioning.

Q Is that in your county? A That is in Fairfax County.

Q You have no complaints there? A That's what I am basing it on, that we have not had. There are a considerable number of houses all through the county, all through the Mount Vernon magisterial district that are functioning properly.

Q How far are they from this Wellington subdivision? A I can't say just exactly.

* * * *

THE WITNESS: There are houses there, the
 257 Tauxemont area is not a great distance from there.
 They have septic tanks that are functioning properly.

BY MR. HALPER:

Q How many houses in that subdivision, approximately? A I couldn't say. Possibly there are a hundred or more.

Q Are they all served by septic tanks? A They are all served by septic tanks.

Q How far is that from Wellington? A Let's see, I guess probably a mile, something like that.

Q Would there be any reason to believe that the soil is any different there? A The soil is probably the same. But I might say, though, that some of the septic tanks in Tauxemont, and some of the other areas in Fairfax County, do not function well.

* * * *

THE WITNESS: Tauxemont.

BY MR. HALPER:

Q In other words, you do have difficulty with septic tanks now and then here and there throughout the county? A Yes, septic tanks are things—I don't know—if I may say, if I were purchasing a home with a septic tank in it, I think I would learn considerable about it.

In fact, I know so much about septic tanks, or
 256 rather, I think I do, that I would almost hate to live
 in a house with a septic tank to take care of sewage disposal.

Q Then, Doctor, you will say from your experience and knowledge, that a septic tank doesn't function like a sewer? A It certainly does not.

Q If a person buys a house, knowing that it is served by a septic tank, he takes it knowing that he is going to have a septic tank and not a sewer? A A person of average intelligence should know what a septic tank is.

Q You don't have to clean out a sewer, do you, unless it gets clogged up? A That's all. A sewer, that's just simply a conveyor that conveys the sewage from a house to the public sewerage lines.

Q And you do have to clean out a septic tank? A You do have to clean out a septic tank.

Q And also septic tanks, as a rule, will work properly under normal conditions, isn't that right? A They should work properly under normal conditions.

* * * *

259 Emanuel A. Baker

was called as a witness by the Defendants, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

A I am in the real estate business.

* * * *

260 Q Do you know the property at 390 Washington Avenue? A Yes, sir, I inspected it the other day.

* * * *

MR. BOLOTIN: Was that December third?

THE WITNESS: I believe, yes, sir.

* * * *

261 We have rented houses there about two months ago. We rented for \$150 a month.

* * * *

Q * * What is the fair rental value of this property? A \$150.

* * * *

Cross Examination

BY MR. BOLOTIN:

Q Mr. Baker, you examined this residence with Mr. Halper? A That's right—no, not with Mr. Halper. I was there by myself.

Q You came, then, after he had gone? A Either after or before, I don't know which.

Q What did your inspection include, just what did you do in the course of your inspection? Would
262 you please give us a detailed description?

* * * *

Q How much time did you spend inside the house? A Oh, about twelve minutes.

Q And outside three minutes? A Approximately three minutes.

Q Did you walk over the entire outside, both front and back? A No, just the front.

Q Did you observe the floors in the house? A Yes, sir.

Q Did you notice the spacing between the parquet flooring? A Yes, sir.

Q Pretty bad looking? A I would say definitely it has to be fixed, yes, sir.

Q You know, underneath the floor, there is a concrete slab, is that correct?

* * * *

263 Q In this house, did you notice whether there were any places, in addition to separations between the parquet, where some were higher or lower than
264 others, an unevenness of the floor? A Oh, yes, there would be an unevenness.

Q Quite a few? A I couldn't say quite a few. I don't know exactly how many. I knew it had to be done.

Q You wouldn't rent the house the way it is? I mean, you would rather not? A Yes and no. That's a pretty broad statement.

* * *

Q I mean you, would recommend, then, that the flooring be repaired, if he wants to live there comfortably, is that right? A That's right.

* * *

Q Did you learn that there was a sewage seepage coming to the surface in the back yard? A No, Mr.
266 Taylor told me something about it, sir, which was the only thing I knew about.

Q If you were taking prospective tenants in there, and you knew that there was sewage coming to the surface of the back yard, would you tell that to the prospective tenants? A Well, if there is trouble with the septic tank, sir, you have to mention it.

Q You have to mention it? A Yes, sir, you would.

Q That would be an ethical practice? A Quite definitely.

Q You think people would rent the house knowing that tank wasn't working properly, or that the back yard had sewage filtrating to the top of the surface? A It all depends how bad they would want to rent a house.

* * *

269 Q And in your opinion, would you say that the person would have to be pretty hard up for a house to live under those conditions, isn't that correct? A Yes.

Q But your answer is, I think, that you—assuming what I have said is correct, it would be pretty hard to place a reasonable value on the house, is that correct?

A That's right.

270 Q You wouldn't live there, anyway? A No, I would not.

Q Even for nothing? A Well, that's going pretty strong, because you can have septic tanks fixed.

* * *

Dr. Henry C. Bradford

resumed the stand, and having previously been duly sworn, was examined and testified further as follows:

* * * *

BY MR. BOLOTIN:

Q Dr. Bradford, you told Mr. Halper that you would almost hate to live in a house with a septic tank. When you said that, did you have in mind the difficulties and conditions under which these people were living at Wellington Park Estates? A I should hate very much to live in a house which is serviced by a septic tank for the reason that I should not like to put up with all the restrictions that are necessary to see that a septic tank operates properly. I wouldn't want to have to be con-

271 fined to flushing the toilet just a few times a day, if I felt it was necessary. One of those tanks holds five gallons. If I lived in a house with a septic tank, I would be constantly thinking that there would be five gallons of water going in. I couldn't empty—I couldn't drop match sticks in it, that's what I had in mind when I said that.

Q You also had in mind the experiences you have had personally in the past three years with these people who are having difficulty in your area. You had that in your mind, too, didn't you? A I had to have that in my mind to say what I said just now.

Q That's what I mean. A Otherwise I wouldn't have possessed that knowledge.

Q You were very mindful of that condition? A Yes.

* * * *

Q Doctor, you know that there is an unsanitary condition existing at Wellington Park Estates, don't you?

A Yes.

272 Q You know that, is that correct? A Yes.

Q Has the Health Department of your County done anything to correct that unsanitary condition? A

The Health Department has on several occasions made efforts and advised him of it, or rather, the people who have had these defects in their systems.

Q You advised the builders, too, haven't you? A Yes, the builders.

Q You have advised them. You have also advised Colonial Investment Company, isn't that correct? A Yes, as far as the Wellington Park Estates—

Q You have advised them insofar as— A Yes.

Q But my question was this, Doctor, has the Health Department done anything constructively? Have they gone in there and corrected the condition? A The Health Department doesn't do the actual work.

Q You have answered my question. Thank you. You know as a matter of fact that that unsanitary condition exists today, don't you, Doctor? That is, in the Wellington Park area? A I don't know, personally, that it does.

Q I beg your pardon? A I don't know personally that that does exist at the present time. I don't recall in our office anything recently about any overflowing of the septic tank effluent on the surface.

Q When is the last time that you yourself went down there to inspect the area? A I have only been there once to inspect the area, and that was back in 1948 on a visit with Mr. Gibson, who was at that time the sanitation officer in that area. I did visit there a few days ago, just prior to this trial, but I couldn't find Washington Avenue, or Washington Road, or Street, whatever it is called.

Q What street did you find? A I found Greenway. I didn't notice any—I noticed, let's see, there's a man named Hill, I think it is, that has a house down on the end of Greenway Road, or Avenue, or Street, I think. It had a tank that was overflowing at the time I was there in 1948 with Mr. Gibson, but that wasn't evident on my visit there Monday or Tuesday.

Q At whose request did you make the visit there Monday or Tuesday? A I just thought that up myself.

Q Nobody asked you about it? A I just went down there because I wanted to see, if I could, to familiarize myself as much as I possibly could, in view of the fact
274 that I had received a summons from the District Court, of the District, to appear here as a witness.

Q But you still haven't inspected the Washington Avenue residence recently or since 1948? A No.

Q What month in 1948 was that, Doctor? A I don't know. I don't recall. If I had to say, I would say possibly October.

Q Was it after Mr. Weston's visit? A Let me change that, it was after Mr. Weston's visit, and it was possibly later. Now, let's see, Mr. Weston came into this picture at my request—a letter that I wrote to Dr. Neal, who is the director of the local health services, who is my immediate superior.

I think it was written on October 18, 1948, requesting that Mr. Weston be sent here to visit us and advise us. The measures that we had advised, hoping to correct this situation, didn't turn out very well, and we were asking for their help.

Q What was there about the situation that made it necessary for you to ask Mr. Weston's help, Doctor? A The overflowing on the ground of the effluent from a septic tank system.

Q I am talking about the Wellington Park area. A Wellington Park Estates.

275 Q Including Mr. Taylor's home. A Including his home, I presume.

Q Was that an unusual condition? A Yes, I thought so.

Q Overflowing onto the surface of the ground, is that what you said? A I thought you meant, was that condition in the Wellington Park Estates an unusual condition.

Q Made it necessary for you to call for help to Richmond? A Yes, because we don't always have to do that.

Q Only when it is an extreme emergency you send to Richmond for help, isn't that right, Doctor? A You might say that, yes.

Q And the extreme emergency in this case was the presence and flowing of human waste and other garbage and sewage on the surface of the ground where people were living, isn't that right, Doctor? That was the emergency? A That was my reason.

Q I beg your pardon? A That was my reason for writing this letter to Richmond requesting assistance.

Q That was pretty prevalent, that condition, in this little area, isn't that correct? A Otherwise I would not have written.

276 Q Sent for help? A Yes.

Q That was a pretty dangerous condition, too, wasn't it, Doctor? A Potentially so.

Q And you were anxious to have it corrected, isn't that right? A Advice as to how to correct it.

Q What, in your opinion, caused that condition, Doctor? A Improperly functioning septic tanks.

* * * *

277 Q Doctor, you remember discussing this thing in detail with Mr. Taylor and myself about a month or two ago, is that correct? A Yes.

Q And then you gave us a complete picture of what had happened in this area, isn't that correct? A Yes.

Q Now, I will come back to my question. There came a time when you learned, back in the fall of 1948, that there were improperly functioning septic tanks in several homes in the Wellington Park Estates, isn't that correct? A Yes.

Q You then made inquiry, or made it your business to learn as to the factors which were causing these tanks to function improperly, isn't that correct? A Yes.

Q What were some of the factors, Doctor, which caused them to function improperly? A The information that I got in reference to that undoubtedly came from the sanitation officers, and, of course, the improper use of a septic tank could easily have taken place in any of those houses, because those houses have, as I understand,—they have these washing machines, these Bendix washing machines, and the ordinary septic tank is not designed to take care of such a thing as that.

An ordinary septic tank is designed to take care
278 of only the usual, and the ordinary ways from a family.

* * * *

THE WITNESS: That is one of the things, the improper use; and another would be the improper construction, and the improper installation of a septic tank.

BY MR. BOLOTIN:

Q How about the improper or poor condition of the soil, would that be a factor? A I didn't mention that. That would be a very important factor.

Q As a matter of fact, Doctor, in this particular instance, the improper soil is the most important factor, isn't that correct? A I can't very well agree with you in reference to that, because there are so many septic tanks in that area with the same type of soil which are functioning properly.

Q But, on the other hand, there are a great many that are not functioning properly in that soil, isn't that correct, Doctor? A There are septic tanks in that area that are not functioning properly.

Q A great many of them, is that correct? A I can't agree with you there.

279 Q How about in the Groveton area? A There are septic tanks in the Groveton area. I am speaking from the records in our office, that come in our office. We have had complaints in that area about septic tanks not functioning. The Groveton area is a very large

area which consists of hundreds and hundreds of houses.

Q Doctor, in answering Mr. Halper's questions, you mentioned the Tauxemont area. You also said, I think, that they are having trouble in the Tauxemont area with septic tanks, is that what you said? A Yes.

Q Isn't it a matter of fact that you had a similar problem there where the sewage comes to the surface and flows down hills at Tauxemont? A Yes, I recall that we have had that occurrence there.

Q Coming back to Wellington Park, Doctor, don't you remember telling Mr. Taylor and myself that the presence of this hard pan or this hard clay was an important factor in preventing the septic tanks from functioning properly? A I don't—I can't say that I recall that I said just those words, that that was the important factor influencing the non-functioning or the improper functioning of a septic tank, of that particular septic tank. That undoubtedly had quite a bit of bearing on it.

280 Q That is your testimony today, is that correct, that the fact that there is hard clay there, or hard pan, as Mr. Weston put it, does have a bearing on it, is that correct? A Oh, yes, it does, and it is a very undesirable type of soil for the installation of a septic tank.

Q Is that a factor, Doctor, that is commonly known among sanitation people, that this type of soil is highly undesirable for septic tank construction? A I should think so.

Q You said something which is very interesting, there. You said that one of the factors that might have hurt this system was the presence of the Bendix washing machine, is that right? The flow from the machine into the tank? A (No response.)

Q It is my understanding, Doctor, that the permits which you did issue did not include a washing machine, is that correct? Do you understand my question, Doctor? A Yes.

Q If you don't, please ask me to repeat it. A We don't—it wouldn't be mentioned on that permit—a Bendix washing machine wouldn't necessarily be mentioned on that permit, is that what you mean?

Q Mr. Weston testified that the little books that he had—he had two little books—do you use those as
281 your guide, by the way? A What books are you talking about?

Q Septic tank requirements. A If you will show it to me, I can probably answer you, sir.

Q I will start from the beginning. Doctor, the State sets certain requirements and specifications for septic tanks, is that correct? A Yes.

Q You people, Fairfax County, adopts those requirements and specifications, is that correct? A Yes.

Q Mr. Weston stated that one of the requirements was not to attach things like washing machines to the septic tank system, do you recall that? A Yes.

Q Is that also one of your requirements that in constructing a septic tank they were not to add any instrumentalities of that type? A Yes, we have found that so many of those have been attached that we have adopted putting that on the septic tank, and trying to explain to these people who are building septic tanks, or the home that are requesting a permit, that the septic tank is not
282 designed for any such purpose as that, if they want to use those machines, they would have to put in a separate system for the reception of the fluids.

Q You have about answered half of my question, Doctor. Coming back to the time that these permits were issued, or specifically the Taylor permit, in July 25, 1947, at that time, this regulation was in force, that these machines were not to be attached to septic tanks, isn't that correct? A It has always been accepted by the Health Department that a septic tank is only designed to take care of the ordinary water from a household.

Q Toilet and bath? A Toilet and bath, and the washing of dishes, and the laundry, but not washing machines.

Q My question is this. Why did you permit Wellington Park Estates and Colonial Investment to attach washing machines to these septic tanks? A We didn't permit them.

Q Then why did they put them in? A I couldn't answer that, sir.

Q Did you know they were putting them in? A No, I did not.

Q Did they ask for permission to put them in? A No, they did not.

Q Would you have given permission for them to put them in? A I don't believe that the Health Department has the right to give permission or not to give permission to put in washing machines.

Q Doctor, I ask you this question. In how many other respects did they violate these regulations? I want you to take your time and think carefully.

MR. HALPER: First of all, where is the evidence that they violated any regulations?

MR. BOLOTIN: Just now, he said that they installed these washing machines to septic tanks, and the installation was in violation of the regulations of the State of Virginia, and no permit would have been issued for it, is that correct?

THE WITNESS: Does the permit say that?

BY MR. BOLOTIN:

Q Look, Doctor. A Does the permit say you can't attach a washing machine, does it say that?

Q Does it say what? A Does it say anything about washing machines on here?

Q No. Is that the answer, then? A Yes. We didn't even know anything about the washing machines. In fact, I didn't, and I don't, believe even Mr. Baker knew that the washing machines were in there.

Q It created an extra burden on the septic tank, isn't that right? A Yes, unnecessary burden.

284 Q My next question is this. You know now that they have installed washing machines to the system, don't you? A I have heard so.

Q You knew when I came out to see you about two months ago, didn't you? A I think I knew at that time that there were washing machines in that house.

Q Did you learn of any other things that they did that shouldn't have been done with relation to the installation of septic tank systems? A No, I think—I am unable to answer so many of those details because—and most of those details can be answered by the sanitation officer who gave this permit and approved it. My position as the Health Officer doesn't bring me very closely into all of these details of which you are asking me. I am unable to answer many of those questions.

Q Well, Doctor, I will be a little more specific. Can you hear me now? A Oh, yes.

Q Didn't you learn that Colonial had built on extra bathrooms in some of these houses without a permit? A I don't recall that.

Q Do you know it now, without my telling you that, do you not? A No.

285 Q You never were told that? A I don't recall that I have ever been told that.

Q Don't you know that when Colonel Wilkins' house—their extra bath was built— A No, I do not.

Q Would you have permitted a second bath to be built onto one of these septic tank systems? A It wouldn't—under ordinary conditions it wouldn't have made any difference.

Q Would you require a permit for that? A No.

Q Would you require notation on the permit? A Would it require what?

Q A notation as to the number of bathrooms? A No.

Q Did you tell us that when you went to see these premises at the time you called for help, you noticed

sewage coming to the surface of the ground? Is that your testimony? A The place that I recall principally, I think, was this Mr. Hill's, or Colonel Hill's place. There was considerable evidence that the effluent from the septic tank system had come to the surface and that was evidenced by the profuse growth of grass—green grass right at that area. But I should possibly correct that, too.

I'm not sure that there was any of this material
286 right there at that time, but there was evidence that it had been there.

Q What is the process, or reason, or factors which make the sewage come to the surface in that manner?

A It is hydrostatic pressure in the tank system, and something has to break loose, and it breaks through and comes to the surface of the ground.

Q But ordinarily, Doctor, all that should go out and be absorbed in the adjacent underground soil, isn't that correct? A Should be absorbed, yes.

Q And the fact that the soil is hard clay prevents its proper absorption, isn't that correct? A Yes.

Q When Colonial applied for this permit, did they indicate that they had made a percolation test? A I don't recall that they did. In fact, I have no personal knowledge of the Colonial people asking for that permit. You see, there are details that occur in my office that I don't know anything about at the time.

Q Was this issuing of the permit by your office merely a routine matter? A Yes.

Q Just a routine matter. Is it necessary for your office to first go out and determine that the soil
287 is suitable for septic tanks before you issue a permit? A That's a part of the routine.

Q Your office does go out? A Yes.

Q And makes a test of the soil? A As I stated just now, it wasn't customary at that time to make tests of the soil.

Q I am talking about the time that these permits were issued in July, '47. Did your office go out and make a test to determine whether or not the soil was suitable? A I don't think there were any percolation tests made—I am sure there were no percolation tests made by our office on that particular soil.

Q Your office didn't do that in this particular instance, is that correct, Doctor? That's my question? A That's true.

Q You did not go out there and make a test? A I don't think they did. I'm quite sure they didn't.

Q Since when has it become the custom for your office to go out and make these tests? A I think—in fact, we don't make percolation tests on all areas. We only make percolation tests when, in the opinion of the sanitation officer he thinks that it is necessary, when there is some question about the soil.

Q In this instance, Dr. Bradford, you left it
288 up to the builder to determine whether or not the soil was suitable for septic tank function, isn't that correct, Doctor? A I don't think that was even thought of. I don't think that question even came up, or that thought even came in our minds.

Q As to who was going to make the test, you mean? A Because we were not customarily making those tests at that time.

Q Prior to the time that you issued these permits for Wellington, had you issued any previous permits for Colonial Investment? A Issued any previous permits to Colonial, prior to these Wellington permits? I don't know. I couldn't answer that correctly. I'd have to go back to the records of the office.

Q Doctor, was this the first time that your office did business with Colonial Investment? Can't you search your memory there a little? A I believe there was another subdivision that was promoted by the Colonial Investment.

Q Prior to this subdivision, right? A Yes. It seems to me this subdivision—you see, you are asking me a lot of questions that I can't answer because I don't have the personal knowledge, and things that I have just touched on in various conversations. It seems
289 to me that this Wellington Park Estate was operated by, or promoted by, someone, and they went into bankruptcy, and the Colonial people took it over. But they are questions that I don't—I don't know, Your Honor, so much about them. It is difficult for me to discuss things.

THE COURT: If you don't know, you just state that you don't know.

BY MR. BOLOTIN:

Q Doctor, isn't it a State requirement that distribution boxes be used? A Yes.

Q Then why weren't they used in this instance? A Distribution boxes have not always been used in the construction of septic tank systems in the County of Fairfax.

Q You heard Mr. Weston testify that distribution boxes were one of the requirements of the State, did you not? A Yes.

Q Was that one of the requirements of your office? A Yes, we require distribution boxes at the present time, but when I came with the department three years ago, distribution boxes were not used in septic tank systems; and that was with the knowledge of Richmond.

Q When did you start adopting the requirement
290 to use them? A Some time in 1947.

Q Was it prior to July, 1947? A Well, let's see, there were a number put in, there were a number of septic tank systems put in through 1947, if I correctly remember, without distribution boxes, and I am sure it was along at about that time. In fact, in going over the records, I find that only a few distribution boxes were used in the septic tank systems in Wellington Park Estates.

Q A very few were used, is that right? A A very few, only a few of them.

Q But under proper construction, a distribution box would be necessary, isn't that correct, Doctor? A Well, I can't say that, because there are so many—there are a great many septic tank systems put in without distribution boxes.

Q Doctor, the making of a percolation test is relatively simple procedure, is it not? A Yes.

Q To determine the nature of composition of underground soil, say, two or three feet, is relatively a simple procedure, is it not? A Yes.

Q If a person made a percolation test on this property, back in July, 1947, and the test determined
291 that the water wasn't being absorbed as rapidly as it should under proper soil conditions, wouldn't that indicate to a person's mind that there might be something wrong with the soil insofar as its adaptability for a septic tank system is concerned? A Yes.

Q Doctor, you talked about excessive filling of the septic tank, and its emptying out, as not permitting the solid matter to remain long enough to be acted upon. What did you mean by that? You said that if the tank is filled up too frequently, or excessively, it doesn't permit the solids to remain there long enough to be treated. What happens in a case like that? A You mean when it doesn't remain long enough?

Q That's right. A Well, your solids are carried out through the outlet into your—into the purification field, and it will clog up your field.

Q Carried out into the field, then, prematurely, is that correct—too soon? A Yes.

Q Which might cause this condition which we find at Wellington Park Estates, isn't that right? A Well, yes, possibly.

Q Here we have a septic tank. What is meant
292 by the water line in the septic tank? A The
water line is the floor of the inlet and the floor
of the outlet.

Q The floor of the inlet? A Yes.

Q Where should that be on the septic tank? A
That's about a foot from the top. You have about a
foot air space.

Q That's the water line, right? A Fluid line, rather
than water line, I would call it.

Q And it is all the way across, is it? A Yes.

Q The field is extended out—from what point does
the liquid or fluid leave the septic tank in relation to
the bottom and top? A It leaves at the outlet. You
have drawn this as the inlet.

Q That's the inlet. A This many times can be on
the same level, can be just a little bit lower. It is prob-
ably better to have it just a little bit lower. It leaves
this outlet and goes into sealed pipes into the distribu-
tion box, and the distribution box has one inlet with a
sufficient number of outlets.

293 Q Let's talk about this particular— A Well,
leave the distribution box out, then. It just goes
in a sealed line of four inch pipes to these tie-lines from
the tank.

Q According to the description on the permit, it leaves
at this point and goes out to the field, is that right? A
That's right.

Q And then the field is in the back yard like this, is
that right? A Yes.

Q And this field fills up with solids and semi-solids,
is that right? A Principally fluid.

Q What happens when the water in the septic tank
goes above the fluid line? A It can't go above that.
I'll take that back, because they just said—some of the
testimony—when you get a hydrostatic pressure from
here, that will go above that.

Q What kind of pressure was that? A Hydrostatic pressure.

Q What do you mean by that?

MR. HALPER: Water. Isn't it water pressure, Doctor?

THE WITNESS: Yes, I should think so.

BY MR. BOLOTIN:

Q So that the pressure on the field will cause
294 the water to go into the tank, is that correct? A
Back up.

Q Back up into the tank and oftentimes it may back up into the house, or come to the surface of the tank, is that correct? A The point of least resistance.

Q So that if, in Mr. Taylor's septic tank, we find water or sewage on top of his septic tank, it would indicate that there was some kind of pressure in the field causing the water to back up into the tank, is that correct? A Yes.

Q That creates an improperly functioning system, is that right? A Yes.

Q We have our material in this field here. There are two types of action. One type of action where the material is absorbed from the surrounding ground, is that correct? A Yes.

Q The water and the solids go into the surrounding earth, is that right? A (Nodded affirmatively.) Not much of the solid, because the earth doesn't absorb solids.

Q What happens to the solids, then. A That's practically free of solids when it goes into that, into the purification field. The solids are left in the septic tank, in that sludge at the bottom and the
295 scum at the top. There is a small percentage, but it's very small.

Q If the ground surrounding this field is of such type composition, what happens to the fluid or material that is supposed to go into that ground?

MR. HALPER: Just a minute. You keep on saying material in that purification field, and the witness has said twice that the material stays in the tank, the solids and semi-solids. He says it's all liquid that goes into the purification field.

MR. BOLOTIN: For the time being we will call it a fluid, Doctor.

THE WITNESS: It is just not absorbed, that's all. The soil is so saturated that it cannot take it up. It's just not absorbed.

BY MR. BOLOTIN:

Q Does it come to the surface? A If the surface is the point of least resistance.

Q It will flow to the surface, make the ground soggy, is that right? A (Nodded affirmatively.) That is one of the things that occurs. It produces a soggy ground.

Q It is one of the things that creates an unsanitary condition, isn't that right? A Yes.

296 Q What is the function of a dry well, Doctor?

A The function of a dry well is just simply to ameliorate that condition, or try to temporarily correct that condition. Sometimes it might permanently correct it.

Q But usually it is a temporary correction? A Yes, I would say, ordinarily put in as a temporary correction.

Q You dig a well, here, say; and you make a line and divert the fluid into the well, is that correct? A Yes.

Q Then when the well becomes filled, it is necessary to dig a second well, is that right? A Yes—the well—dry well, functions just the same as the purification field. The soil is supposed to absorb the liquid in it.

Q That is, the soil surrounding the dry well, is that right? A Yes.

Q If it doesn't absorb it, you have the same effect above the dry well as above the purification field, is that right? A Yes.

Q You have a soggy condition, and an unsanitary condition, is that right? A Yes.

297 Q So we have to build another dry well. So, at most, it prolongs the agony of the improperly functioning system, is that right? A That is, if you want to try to correct it in that manner. There are other methods of correcting it, too. You can put in an additional field, if you have additional area.

Q If you have enough ground, you can put additional fields in, is that right? A Yes.

Q Suppose you don't have enough ground, what happens then? A You can't put in additional tile.

Q Mr. Taylor has a lot a hundred by one hundred fifty, as you notice here. Would he have room for any additional fields? A I think he would, yes.

Q How many more fields could he put in? A He could put in, at least, I should think, three hundred feet more field.

Q And then he will eventually have the same condition above those new fields that he has in the present field, if the adjacent soil doesn't absorb the fluid, is that right? A If the tank were put in under exactly the same conditions and exactly the same construction, I would think that just about fifty percent of the
298 burden would be taken off the first field and put on the second field, so you would have—the condition would be just half what it is.

Q Would there come a time when both fields would be saturated, is that right? A No, I don't think so, with the knowledge that in Mr. Taylor's home this septic tank was put in at that depth, I do not believe in putting in another field—it would only require distribution—the system would not be put in so deeply into the ground, and there would be more of that fluid ultimately disposed of by evaporation or aeration.

You see, with the septic tank, as in Mr. Taylor's home, so deeply into the ground, or rather, more deeply

into the ground than septic tanks are ordinarily put, we do not get the benefit of the evaporation or aeration.

About forty percent of that fluid that goes into the septic field, the purification field, is ultimately disposed of by evaporation, and about sixty percent of it is taken up by the soil.

When that is put down deeply into the ground, and particularly into a tight clay soil, it's not very well taken care of.

Q There is no absorption into the surrounding soil?

A And that throws almost the whole hundred percent of the fluid on that soil. Of course, some of it does come up to the surface even at that depth, I guess. It
299 would be difficult to say how much, but certainly not forty percent.

* * * *

300

Dr. Henry C. Bradford,

the witness at the time of the recess, resumed the stand and testified further as follows:

* * * *

Q Dr. Bradford, what is meant by an underground water table? A An underground water table is the part of the earth into which the surface water flows, and it is that part of the earth that takes up that surface water. And that goes down into—I don't know how many feet, but anyway, it might be two feet, one foot, ten feet, fifteen feet, twenty feet. I believe above that you get what you might call a capillary fringe which extends up to a certain distance above the upper zone of the soil that we call the water table, the surface water.

Q Am I correct in assuming this, then, Doctor, that the underground water table is the level beneath the surface where the water settles? In other words, when

you dig a hole almost any place, you are bound to strike water, isn't that right? A Yes.

301 Q As you pointed out, some places one foot, and some places 20 feet, is that right? A Yes, that's the uppermost part of the saturated soil.

Q But I don't have it quite clear in my own mind. I am trying to learn from you, Doctor, I am trying to develop a picture. Does the underground water table mean the place under ground where the water can be reached, or where the water remains? A Yes, I guess I misunderstood you. The table is the uppermost part of the saturated soil, which is called the water table. In other words, the height to which the water rises in the earth. That is surface water which has seeped through the soil into the ground below.

Q Mr. Weston spoke about this and I didn't understand it. This is the surface of a cross section of earth. At a certain point below the surface—I won't use any figures here, but I will just draw this line to indicate some point below the surface—there is a line at which water can be detected, is that right? A Yes, which is the water table.

Q So this is the uppermost part of the water, and water can be expected below that point, is that right? A That's right.

302 Q It's like in some instances it might be a stream, or it might be just stagnated, is that right? A It wouldn't be a stream, because when you get into a stream, then you have gone down below, possibly, rock, and you have gotten through some impervious material. The water that you find at the top, which you call the water table, that goes down to the impervious material, and that strata might be, say, possibly ten feet or fifteen feet in thickness or depth.

Q The strata of what, the water? A The strata of earth which holds that saturated water, the uppermost part of which we speak of as the water table.

Q So that when you dig a hole through the ground, the first thing you strike then would be the uppermost part of that water table, is that correct? A Which is the water table?

Q That is the uppermost part. A Yes.

Q And then the strata which holds that table might be five or ten or twenty feet in width? A (Nodded affirmatively.)

Q Now, Doctor, you told us that at some places in the earth's surface the water table might exist a foot below the surface, other places ten, twenty, or more
303 feet below the surface, right? A Yes.

Q Doctor, do you know as a fact that the Wellington Park area has a high underground water table? A Not of my personal knowledge.

Q Have you learned that it has a high underground water table? A Yes.

Q What would you call a high underground water table? A I would call two feet.

Q So that two feet below the surface—that is this line here (indicating)—would be a high underground water table? A Yes.

Q So that if you struck water by digging a short hole, that would indicate, to your mind, there was a high water table present, right? A Yes.

Q Now, Doctor, what effect, if any, would such a high water table have upon the septic tank system? A It would be a factor which would in all probability impair the proper functioning of the septic tank system.

Q Opening up your files, you find a letter written to you by Mr. Weston, which I believe was the result of his coming down here because of your plea of help, is that right? A Yes.

304 Q Would you find that letter, sir? (The letter was handed to Mr. Bolotin) And this document is part of the official records of your office? A Yes.

Q And is kept in regular course of your business?

A Yes.

Q And is the direct answer of Mr. Weston to your request for assistance, is that right? A Yes.

* * * *

306 Q Dr. Bradford, will you please examine that letter and tell us whether or not Dr. Weston made any recommendation to you as to how he thought the homes in this area should be served in order to permanently correct the condition out there?

MR. HALPER: Your Honor, you see, that is objectionable, because here we are at December, 1948. I don't know what the purpose is, whether it is to
307 charge them with knowledge. I guess by December 1948 they had all the knowledge about these conditions, because there is testimony of putting in dry wells, and trying to correct things long before that. I think it is just cluttering the record.

THE COURT: I suppose the purpose is to show what was done.

MR. HALPER: If that is material; if Your Honor wants to hear what was done after that.

MR. BOLOTIN: It is all part of the same survey, Your Honor, and part of the same situation.

THE COURT: Go ahead and ask him.

THE WITNESS: The recommendations—I believe if I read these recommendations it will be best. The recommendations, that all the homes in this area be served by public or private sewer connected to an approved sewerage treatment plant.

BY MR. BOLOTIN:

Q Are you in agreement with that recommendation?
(Pause)

MR. HALPER: Just a minute, Your Honor. We are certainly going far afield.

THE COURT: I think so, too.

MR. BOLOTIN: He is their witness, Your Honor.

MR. HALPER: If you want my recommendation, I would say yes. The testimony here is that a
308 sewerage system is preferable to a septic tank, but what is the obligation of these defendants?

THE COURT: It seems to me that you are asking him now not anything factual but something about an opinion that he may have at the present time.

MR. BOLOTIN: They qualify him as an expert, Your Honor. They went into detail about his experience and background, and how much knowledge he had on treating sewage and septic tank systems. I assume he is an expert. I admit he is. If he is an expert, he certainly can tell us whether or not he thinks a certain recommendation to correct this condition is a proper recommendation or not. I fail to see the objection.

THE COURT: He may answer.

THE WITNESS: In answering that question, if I may be permitted to say, I might have to open up a whole discussion of the best method, or, rather, of the various methods whereby that whole area might be supplied with sewage disposal systems.

I can answer this question directly by saying that that is the best method whereby these houses can be served from a sewage disposal viewpoint.

BY MR. BOLOTIN:

Q And, Dr. Bradford, is it not a fact that this would be the only permanent method of correcting the
309 entire mess out there? A That would be a permanent cure.

Q So there would be no reoccurrence of this mess out there, isn't that right? A Yes.

Q One or two more questions, Doctor, and I will be through with you. This morning when I questioned you about the health aspect due to the exposed sewage on the surface of the earth, you said something about, it was or could be a potential health hazard. Then you

also said that you made certain recommendations—your office itself couldn't clarify it—but you made recommendations to various persons to clean it out, isn't that right? A Yes.

Q Isn't there some kind of a law or statute in your county whereby these Colonial people can be compelled to clean up that situation? A Yes, there is a law, and it's a rank violation of the laws of the State of Virginia, and also the laws of the County of Fairfax that any fecal material or leakage from a septic tank run on the surface of the ground, and we have laws, and we can easily bring a person to court.

Q You mean criminal action? A We could.

Q Why hasn't criminal action been taken in this place? A If we were to bring criminal action, we
310 would bring it against the owner, and in Mr. Taylor's instance, against Mr. Taylor.

Q Even though you know he is not the person primarily responsible for the condition? A Legally he is responsible because he is the owner of the property.

Q But you wouldn't bring criminal action against the person who created the condition originally? A Mr. Taylor would be the person who created it, because he was the person using the toilets in the house.

Q Why haven't you criminally prosecuted Mr. Taylor?

THE COURT: I don't think that is a helpful line of examination.

MR. BOLOTIN: Well, Your Honor, I respectfully submit this, that the situation is very bad out there, as the witness says. He is a health officer. Speaking for the Taylors, and perhaps the other people, I think they'd like to know why criminal action hasn't been taken.

THE COURT: That isn't an issue in this case.

MR. BOLOTIN: No more questions, Doctor.

Redirect Examination

BY MR. HALPER:

Q Doctor, do you happen to know how deep these wells are? A These dry wells that were built, that were dug?

311 Q Yes. A No, I don't believe I do. I think—let's see, Mr. Baker might tell that better; they are probably 20-30 feet.

Q How many? As deep as 18 feet? A I don't know, I better not say.

* * * *

George F. Warner

was called as a witness by the defendants, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

Q What is your business? A Plumbing contractor.

* * * *

312 Q Did you have a contract to do the plumbing on those dwellings? A I did.

Q Did you have a subcontract to do the septic tanks? A No.

Q Did you subcontract it yourself? A No, I didn't.

Q Did the Colonial Investment Company or construction company subcontract that? A Yes.

Q Did you connect the septic tank with the house? A No, we ran five foot outside the house, and furnished the fittings for the tank.

Q You built the sewer line to the tank, did you not? A Yes, to the tank.

Q Were you out there during the course of construction? A Yes.

Q Do you know whether permits were obtained to build these tanks? A Yes.

Q And do you know whether the tanks were built in accordance with specifications and regulations of the county authorities? A They must have been, they were all inspected.

* * * *

313 MR. BOLOTIN: All you did was run the line out of the house and that finished your job?

THE WITNESS: Ran the line to the house and furnished the fittings that went into the tank.

BY MR. HALPER:

Q Were you there when the inspection took place?

A I can't say I was there with all of them, but I was there off and on.

Q Mr. Warner, did you visit the premises 390 Washington Avenue with me on Saturday, December 3, 1949?

A Yes.

Q Did you go into the house? A Yes.

Q Did you see the toilets flushed at that time? A No.

Q Why not, do you know?

* * * *

314 Q Was there any conversation about flushing the toilet with Mr. Taylor? A Yes. You asked Mr. Taylor to flush it, and I think he remarked that, "Well, you know what a toilet looks like."

MR. BOLOTIN: I didn't hear that.

THE WITNESS: I say Mr. Halper asked Mr. Taylor to flush the toilet, and I think the remark was, he just said, "Well, you know what a toilet looks like." That's all there was to it.

BY MR. HALPER:

Q What did they do? Did they walk out of the bathroom, or stay there, or what? A I think we were standing in the little hall next to the bathroom. Then we went on out the house, I believe, went through the house.

Q Did you pass around the building? A Yes.

Q Did you go out into the yard? A Yes.

Q Did you go to the end of the lot to the rear? A Yes.

Q Did you see any condition around there that was abnormal? A No.

. . . .

316

Cross Examination

BY MR. BOLOTIN:

Q How long did you make this inspection in number of minutes or hours? A Oh, it was in a matter of minutes.

Q How long? A A matter of minutes.

Q Ten minutes? Five minutes? A Oh, I imagine we were there perhaps a half an hour, thirty minutes.

Q You were there a maximum of thirty minutes, is that right? A I'd say yes.

Q That's both inside the house and outside the house? A Yes.

Q What time of the day was it? A I know it was three o'clock.

Q How much time did you spend inside the house? A Ten minutes.

Q What method of inspection did you employ outside the house? A I merely walked around.

Q Did you cover every square foot of ground? A No, I didn't.

316 Q Did you probe the earth with any instrument? A No, I didn't.

Q Did you dig any holes? A No.

Q Did you examine the septic tank? A No.

Q Didn't you look to see whether the tank was full or overflowing? A Well, yes, we did look at the top of the tank. I saw no evidence of water.

Q Did you see any evidence of recent water? A No, I didn't.

Q It was dry? A Yes.

Q And the entire yard was completely dry? A Yes, there was no—yes, it was dry.

Q It was completely dry? A Yes.

Q Did you look on any of the adjoining lots? A No, I didn't, other than standing, you know, looking around. I didn't go on any other lots.

Q You mean you didn't see any seepage on the surface from other lots? A We didn't go on any other lots.

Q Standing on Taylor's lot, didn't you see any
317 seepage from other lots? A No, I didn't see any seepage from other lots.

Q Did you look for seepage from other lots? A Not in detail, no. As I say, we were merely standing on the lot, and as you normally look over the area, you just look. I didn't see any evidence of any water.

Q Was it a calm day or a windy day? A That I can't answer. It was Saturday. I don't recall whether the wind was blowing or not.

Q Did you observe any bad odor while you were there thirty minutes? A No.

Q Everything was fine? A As far as I can tell, there wasn't any odor.

Q What were you looking for? A I was merely brought down to see if the plumbing was working all right.

Q Just to see if the plumbing was working all right?
A That's right.

Q That's the inside plumbing? A Yes. I was just asked to come down and look at it.

Q Look at the plumbing. A At the plumbing and just walked around the premises, just looking at it, that's all I knew.

318 Q Was this your first job for Colonial? A No.

Q You have done other work for them? A Considerable.

Q Beg your pardon? A Quite a lot.

Q Out in Virginia? A That was only the second job in Virginia.

Q Are you working for them now? A Yes.

* * * *

Harold David Baker

was called as a witness by the defendants, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

319 Q And what is your present occupation? A Sanitation officer, Fairfax County Health Department.

Q And how long have you been that—have you worked in that capacity? A I have been there since January first, 1944.

Q Continuously to the present time? A Yes, sir.

Q And then you were the sanitation officer in 1946, '47, and '48? A That's right, sir.

Q Do you recall the Wellington subdivision? A I do, sir.

Q I think the permit here which has been offered and marked as Defendant's Exhibit No. 2 was signed by you, is that right? I show you the photostat. A That is correct.

Q In signing that permit, would you say that it indicated that you had approved the issuance of a permit? A That indicated I had approved the issuance of a permit.

Q When was the application made? Can you tell by referring to that date? A That was made on July 25, 1947.

Q And when the application was made, what
320 was the condition of the topography? I mean the site. A Well, the topography of that time—no

buildings under construction, some grading been done; the topography was rather rolling, rolling areas, somewhat the same as that whole area is concerned, that particular part of the district.

Q That portion of the area which eventually became the building site, was there anything on there, any construction commenced? A No.

Q You said except some grading. A There was possibly a little grading down there, and that might have been done by the folks back, but you see they don't do any work to start on our septic tank permits—on their building, rather—until after the permits are issued. That is a policy of the health department.

Q Did you make an inspection of the ground? A I made an inspection two months before, July 25.

Q Before the permit was actually issued? A That's right.

Q Were you requested by anyone, or were you required by any rule or regulation of your office, or by any requirement of state rule or regulation to make any tests of the soil prior to issuing the permit? A No, sir. At that time it was not the policy of the health department to make any percolation tests, whatsoever.

321 Q Just how large a site is this Wellington site, do you know? A Well, there are some forty houses there, and they run, I would say, roughly, it is possibly four to five acres or a little more; right around that figure.

Q What was the surrounding area used for at the time we are speaking of—July? A The surrounding area—Tauxemont subdivision, Boulevard Acres, Hollin Hills, Hollin Hall Village, and one other place—G & H Construction Company—all homes being built at that time.

Q Do they surround this Wellington area on all sides? A They do, sir, practically on all sides.

Q Starting from the center of the Wellington area,

and describing a circle with that at the center, how large a circle would you ascribe to take in the subdivisions that you have now mentioned? A Within a radius of some—about, I would say, roughly, three to five miles, at any rate.

Q Within that circle, how many houses would you estimate in these subdivisions were in existence at the time we speak of, July, 1947? A At the time I speak of, there must have been at least 400 houses there.

Q Any of those houses served by a sewage system? A One development. That is, the Hollin Hills, and at that time it wasn't completed.

Q You mean it is served by sewer now? A It is served by sewer now. But at that time there wasn't anybody living in the houses. There were houses under construction, and we knew there was to be a sewerage plant. And the balance of the houses mentioned, I suppose there are about fifty or sixty houses. I can't be sure of that, but I believe that is what are in there. The balance of all the houses of the 400 I have mentioned were served by septic tank.

Q Can you approximate the time, going back from the date we speak of, July, 1947, when the first houses, or the first group were built? In other words, how long has that been served by septic tank. A I came in '44, and some of the permits were issued for Tauxemont way back in 1939, since our sanitation went into effect, the 1st of July, 1938. So that means that there were homes in Tauxemont served as late as '39.

Q Incidentally, had you since the beginning of your work in January, 1944, as sanitation officer, received any complaints about the operation of these septic tanks from these other subdivisions? A In some cases, probably not more than, I should say, out of that number, not over maybe 15 or 20. In other words, if we had had quite a few complaints on it, we would not
323 have had a chance to do anything else in our office.

Q In addition to the situation that you have just described, was there anything else that would put you on notice that the Wellington subdivision, with respect to the texture of the soil, or with respect to any other condition whatsoever, was not suitable for the building of houses and the installation of septic tanks? A Well, we had no real choice on the matter under a ruling of our Commonwealth attorney of the county. It so happens that every reasonable chance or thought could be given to the fact that they would be satisfactory.

Q That they would what? A Be satisfactory.

Q And based upon that you issued a permit? A That's right, sir.

* * *

324 Q Mr. Baker, did you deal with Colonial Investment Company? A I dealt with Colonial Investment Company—an agent of Colonial Investment Company.

Q They were the agent for the builder, were they not? A Yes.

Q And your permit is issued to the Colonial Investment Company? A Wellington Estates, Colonial Investment Company; they were the agent for the owners of the premises.

Q The work went forward when the permit was issued? A Right.

Q Is there any requirement of your office, or any rules or regulations of the county, or any rules or regulations of the state that after the permit is issued that the installation be supervised or inspected as the work progresses? A The local county ordinance, which is based on the state bulletin, which is a recommendation and not a law, indicates that we shall make at least two inspections of a particular premise. We are handicapped because we don't have help enough, or we would follow the job completely through.

Q Are you one of those inspectors? A Yes, sir.

Q And were you the inspector who had this job in hand? A I had this job, yes, sir.

Q Now, then, Mr. Baker, would you tell the Court when you made your first inspection, and what was the condition of the installation at that time, what stage had it reached?

326 MR. BOLOTIN: On which premises?

MR. HALPER: On 390 Washington Avenue.

THE WITNESS: I'm not sure about 390. What lot number was it, could you tell me that?

BY MR. HALPER:

Q I think it is on the permit, 15 and 16. A 15 and 16. The first inspection was on November 4, 1947, and at that time I visited the job from the standpoint of checking the field, primarily. I had been called to come down to check several fields in that particular area, inasmuch as we had had considerable rain and snow and had bad weather, and there was an effort made to get these covered up. And I inspected the field only.

Q Just a minute, so that we can follow you. The field, you mean, is not where the tank would rest, but where the distribution is? A It is your distribution purification field. It is your filter bed. That is what it is. And I also made an inspection of the inlet and outlet pipe. The inlet pipe being that line from the house that brings your sewerage from your stack into your tank, at least 12 inches below, with your air space above, and with the tail piece and another "T" going out. And it is customary for those either to be on the level or not more than one or two inches in difference. That is, your flow line, or effluent line. And I checked and found

327 that the inlet was—that the outlet was higher than the inlet—and I asked that that be changed.

Q Was that changed? A That was changed on November 10. At least, it was changed before I got there on November 10.

Q You are referring to the testimony of Dr. Bradford that it is advisable for the outlet pipe to be some little distance below? A That's right, that increases your gravity feed into the field.

Q You found that change necessary, and you ordered that it be made, and it was made? A It was made.

Q That was November, 1948? A '47.

Q If that is your testimony, then I presume that the stage of construction was that the tank had already been put in the ground? A That's right.

Q Had the distribution field been laid out? A It had been not only laid out, but your tile was in the ditches, your filter bed was in the bottom of the ditch, and your lines were staked out in the grid field as they were made out, as here indicated. There was no back-fill. There was no back-fill on the trenches. By
328 back-fill, that is the covering up of the actual ditch.

Q You mean the cinders haven't been put in there? A The cinders had been put in, in the base.

Q You mean the six-inch topsoil hadn't been covered? A No, sir, had not been put on.

Q So it was exposed to view? A That's right. I could inspect it.

Q That gave you the opportunity to determine whether it was properly laid. A Yes.

Q At that point, at that stage of construction, everything was going according to plan, and according to permit, is that right? A Progressing as to permit, yes, sir.

Q When did you next make an inspection? A The next inspection that I made in there was, I think, in—practically all of them were finished by that time—it was the latter part of November of '47. You see, it is the policy of the Fairfax County Department, when we approve a system, we do not ask them to cover it all over until we have seen it. In other words, the very question you have just asked. Then after we leave the job, they back-fill. Now, all your grading may be completed after

that time. So we do not go back after once we have looked to see that the field is there. We make no
329 more inspection trips to see whether it is back-filled or not.

Q Did you make any trips after the fill had been put in? Did you ever visit the premises since? A Not until later on. That was probably in April or May of 1948.

* * *

Q What was your final determination after your last inspection with respect to the general situation? A You mean of this particular premise?

Q Yes, the Taylor house. A Of this particular premise, that there shouldn't be any reason why, if they back-filled it, and probably got a little grass over it,
330 and it dried out—we had considerable mud and rain, as I have already mentioned, when they were being installed—there was certainly no reason why, after that dry-out period, it wouldn't function properly.

Q There has been considerable testimony here that this system didn't function. Incidentally, what experience have you had with septic tanks? What is your general experience? A My general experience has been—I have also installed them. I am a registered draftsman with the Navy. I have also had five years' construction with Detroit Steel in steel design and windows and ventilation projects. I have also been a plumbing relations man with International Nickel. I have also had five years of very excellent help from a man in the State of Virginia, born in the county, having 30 years with the health department, predecessor of Mr. Weston, who is so well qualified that he is the state director of roadside establishments. And I have had pre-engineering and pre-law, University of Illinois and Knox-Lombard College at Galesburg.

Q How much information have you received with respect to the construction and operation of septic tanks, especially of the type that we are inquiring about here? A Well, that is taken up in your state bulletin, and also

in the training period that the state gives you.
331 Q You have had that? A I have had that, yes,
sir, in Norfolk, Virginia.

Q Mr. Baker, as I started to say, there has been considerable testimony here about the failure of this tank, this septic system, to function. Can you state, generally, what factors would interfere with the proper operation of a tank, assuming that the tank was properly laid and built of proper materials, and in the proper locale?

MR. BOLOTIN: Your Honor, instead of giving the witness a hypothetical question as to what factors would, I think he should ask him what factors in this case did prevent the tank from operating.

MR. HALPER: That is a good suggestion. You may do that, Mr. Baker.

THE WITNESS: What factors did? I wouldn't be able to answer, for the simple reason that the people weren't living in it at the time I made the inspection, and I was not back to that premises until, as I have stated, in April or May of 1948.

Now, the conditions that could arise and cause that tank or any other tank to go bad would be an abuse of the system by using too much water. In other words, folks from the city sometimes come out and expect to use a septic tank the same as you do a sewer set-up, and you can't do it.

The second thing is, they'll add a shower. They don't think, "Is that going to affect my system?"

332 They'll add another bathroom, or stool in the basement, and they will not come to the department. And the first thing, when we get out there, we'll find that, and the system has been overloaded.

The other factor is your automatic washing equipment. Automatic washing equipment, when we know that it's going in there, we certainly do, at this time, specify that it must have and be kept separate from your sewage disposal field.

And another thing is the sidewalks may be placed over the top of the drain field.

Another thing is that driveways ten to twelve feet wide, maybe fifty feet long, may be over the top of the field. That reduces your sun-aeration, which is a very, very important factor of the proper operation and working of a system.

Q Is that the absorption by the rays of the sun? A That is the absorption, yes, sir.

Q By the sun? A By the sun, that's right, which is the most important factor in our whole septic tank problem in Fairfax County.

Q When you speak of aeration, you mean the air entering the soil, and combination of sun and air? A Combination of sun and air, as the effluent rises from the bottom of your ditch up to the top. The operation is so that the sun can help dry that effluent up.

Q What, if anything, would an excessive season of rainfall have upon the operation of a normal system? A Well, naturally, that increases your saturation area. Your saturation area round your ditch will have more than it can handle. They are supposed to handle sewage only. But if you have excessive rainfall, then that ground is already saturated with surface water.

Q Mr. Baker, there was some question here about the water table. From the questions that counsel put to Dr. Bradford, I took it to mean that it isn't the level of the water underground, but the point underground where the water will not travel any further, isn't that the water table? A That's right.

Q Now, these dry wells were dug—do you know anything about the dry wells that were dug here? A Yes, sir.

Q How deep were they? A Some of them were—they were anywhere from twelve to thirty-six feet.

Q Wouldn't they pierce the water table? A They did not find water. They did not find water on the floor that I looked at.

Q And these dry wells—a dry well is really a well filled with gravel, isn't that all it is? A That's
334 right, it's filled with cinders, or a filter bed agent, crushed stone, gravel, is placed there with the idea of reducing your hydrostatic pressure, which the doctor already mentioned on the stand this morning.

Q And that fluid which enters the dry well may find its way out through the side walls as well as the bottom? A Exactly.

Q And that serves to release the hydrostatic pressure, as you say? A That's right.

Q Now, then, would you say there was a water table here only a few feet below the ground, in view of the fact that those wells were dug, and no water found? A That may be, in certain cases, but I only remember of two cases where the septic tanks were put in. A septic tank is, ordinarily—I'll have to illustrate, Your Honor, to answer that question.

The septic tank is eight feet by four by five. You excavate a hole of five feet six inches deep. There were only two that I recall that had any water in them at the time the septic tank proper was installed, and that, in my opinion, at the time, was due to the excessive rain that we had had.

Q Mr. Baker, a septic tank system is not preferable to a sewage system, is it? A No, sir.
335

Q And as a matter of fact, the reason septic tanks are installed is what, actually? A A stopgap between an outside privy and an inside toilet.

Q That isn't the answer I wanted. I mean, when do they pick the septic tank, and when do they pick the sewer, if a sewer is available? Now, do you know what I mean? If your trunk line ran along Washington Avenue, and all you had to do was put a lateral in, you wouldn't— A The answer to that is, under the sanitary district laws of Fairfax County, in which you have three districts, Number 1, Number 2, and Number 3, in

any sanitary district, the person or party must be within three hundred feet, and if they are not, three hundred feet, they are not available.

But if they are within three hundred feet of any lateral owned by the United States Government, leased to the county, or owned by the county proper, they must connect into the sewer, so that the person who buys a house with a septic tank isn't picking a septic tank, necessarily, but is picking a house that can't be served otherwise.

* * *

338 Q Will a septic tank which is properly placed and made of proper materials operate at all times and under all conditions efficiently, or will it only operate under normal conditions? A It will only operate under normal conditions.

Q Mr. Baker, do you happen to know who occupies the house contiguous on the rear of the Taylor property? A No, I don't.

Q Do you know of a house to the rear there that has been there for some years? A Yes, I know. Yes, I know where you mean. I don't know whether they still live there.

Q Do you know who occupied it, or who occupies it now? For what use? A No, I don't.

Q You don't know whether they have a child nursery there? A Oh, I see. I thought you meant Wellington Estates.

Q No, that is not on the Wellington Estate property, is it, the house I am speaking of? A No, it is not. That was a Ditto Child Nursery before August 11, 1948.

339 Q They have since left? A I don't know.

Q They had a lot of children there, did they not? A That's right. They had some five or six.

Q If the sanitary conditions there were as horrible as Mr. Bolotin wants us to believe, would you permit the children's nursery to be maintained there?

MR. BOLOTIN: I object to that.

THE COURT: Objection sustained.

* * * *

340

Cross Examination

BY MR. BOLOTIN:

Q Mr. Baker, about the time that you were making these inspections November '47 you had quite a few other places to inspect, too, is that correct? A Yes, sir, that's right.

Q Did you make notations on the dates of the various places you went to? A No, I didn't. I mean at the time. I don't have any record of that now. Most of my inspections at that time though, were, practically, to go down there, and then back into another area, because I was covering four areas at the time.

Q In visiting the Taylor property, how long would you remain there to make the inspection? A Well, on the first inspection I suppose I was there about half an hour. And on the last inspection I don't suppose I was there over about fifteen minutes.

Q These dates you mentioned are just from memory, is that correct? A They are the dates on the permit. You have that there.

Q That is where you got the information, from the permit? A No, I read it—from my own office.

Q Mr. Baker, when you issue a permit of this
341 type to install a septic tank system, do you give any assurances that the system is going to function properly? A The only assurance—we give a lay-out for a septic tank; we are reasonably sure that it will work. We are half the time not asked as to whether it is going to work or not.

Q When the application is made, you merely issue the permit, is that right? A That's right.

Q It is merely a ministerial duty, as far as you are concerned? A That's right, sir.

Q Do you give any assurances that the soil where the tank is to be installed is suitable for septic tank systems?

A That usually comes out when you first talk to the contractor or whoever is going to do the work.

Q It usually first comes out? A That's right.

Q What discussions did you have with Colonial about the suitability of the soil when this permit was applied for in July, 1947? A Well, the discussion that I had with Colonial previous to this was in March about two months previous, at which time I met Commodore Badt and Mr. Leverick on the premises. They had a plat, and

on that plat there were some eighty houses. This
342 plat had been recorded and under the policy of the health department as of 1941 it was necessary that they at least not only have that plat served to the planning commission, but as of a later policy of 1945, they have at least eleven to fifteen thousand square feet for a central water supply, or if they had a septic tank and a well on their own premises, at least 20 thousand. In looking over the plat we found that these lots, although previously recorded, were less than that amount, and I advised them that we had had some trouble with septic tanks in the area, that the ground was tight, but that I had no other choice than to issue them a permit by combining lots for sales purposes, at any rate.

Q Then they went ahead and built Taylor's house on a lot containing 15,000 feet, after you told them that the law required 20,000 feet, is that correct? A Let me get your question again, please.

Q They went ahead and built Taylor's house on a lot containing 15,000 square feet, isn't that correct? A Approximately, because they were to have a central water supply, which is what we had.

Q But you just said that 20,000 feet was the requirement. A With a private septic tank and a private well. A central water supply is one that services more than one house.

Q Was 15,000 feet, then, the minimum require-
 343 ment? A Ten thousand was the minimum, but
 we suggested at least fifteen. Approximately 15,000
 square feet.

Q But you did suggest to them— A That the soil
 was tight in the whole area.

Q And not suitable for septic tanks? A I said it was
 not suitable. I said that it was tight in the whole area,
 and that we had difficulty on a few tanks in the area.

• • • •

369 Filed May 17 1950 Harry M. Hull, Clerk

Plaintiff's Exh #1

COLONIAL INVESTMENT COMPANY

Real Estate

815 - 17 Ninth Street, N. W.

Washington 1, D. C.

Republic 6650

FINANCING - MANAGEMENT - SALES - RENTALS

Washington, D. C., March 5, 1948

RECEIVED FROM *Victor R. and Dorothy E. Taylor,*
918 18th St., N. W. - NAtional-3931 a deposit of *One Thou-*
sand (\$1,000.00) (Check) to be applied as part payment in
 the purchase of lot 15 and 16, 390 Washington Avenue,
Wellington Park Estates in Square
 with improvements thereon known as
 in the *Fairfax County, Virginia* upon the following terms
 of sale:

(1) Price *Sixteen Thousand Nine Hundred and Fifty*
Dollars (\$16,950.00).

(2) Purchaser agrees to pay *Thirty-five Hundred Dol-*
lars Dollars (\$3500.00) cash at the date of conveyance, of
 which sum this deposit shall be a part.

(3) The purchaser is to assume a first deed of trust
 secured on the premises of *Eleven Thousand Two Hundred*
and Fifty Dollars Dollars (\$11,250.00) due
 19....., bearing interest at the rate of $4\frac{1}{2}\%$ per cent per

annum, payable *approximately \$71.19 a month including principal and interest.*

(4) For the balance of deferred purchase money amounting to *Twenty-Two Hundred Dollars* Dollars (\$2200.00) purchaser is to execute and deliver a second deed of trust secured on said premises, to be paid in monthly installments of *\$32.00 per month*

Dollars (\$32.00), or more, including interest at the rate of 6% per cent per annum, each installment when so paid to be applied first on the payment of interest on the amount of principal remaining unpaid and the balance thereof credited to principal.

Balance of second trust, if any, due and payable at end of five (5) years.

Trustees in all deeds of trust are to be named by the parties secured thereby.

(5) The property is sold free of encumbrance, except as aforesaid; title is to be good of record, subject, however, to covenants, conditions and restrictions of record, if any, otherwise, the deposit is to be returned and sale declared off at the option of the purchaser, unless the defects are of such character that they may readily be remedied by legal action, but the seller and Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken promptly by and at the seller's expense, whereupon the time herein specified for full settlement by the purchaser will thereby be extended for the period necessary for such action.

(6) Seller agrees to execute and deliver a good and sufficient special warranty deed, and to pay for Federal revenue stamps on the deed.

(7) Property is sold and shall be conveyed subject to an existing tenancy as follows:

House under construction—thirty (30) days possession.

Seller agrees to give possession at time of settlement. If seller shall fail so to do and occupies said property,

seller shall become and be thereafter a tenant at sufferance of the purchaser, and hereby expressly waives all notice to quit provided by law.

(8) Seller assumes the risk of loss or damage to said property by fire or other casualty until the executed deed of conveyance is delivered to purchaser, or is recorded for him by the Title Company making the settlement.

(9) All notices of violations of Municipal orders or requirements noted or issued by any Department of the District of Columbia, or actions in any court on account thereof, against or affecting the property at the date of settlement of this contract, shall be complied with by the seller, and the property conveyed free thereof.

(10) Settlement is to be made at the office of the Agent or at the Title Company searching the title, and deposit with the Agent or the Title Company of the cash payment as aforesaid, the deed of conveyance and such other papers as are required by the terms of this contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof.

(11) Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes as issued by the Collector of Taxes of the District of Columbia, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by the seller or allowance made therefor at the time of transfer.

370 (12) Examination of title, tax certificate, conveyances, notary fees, State revenue stamps, if any, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser who hereby authorizes the undersigned Agent to order the examination of title; provided, however, that if upon examination the title should be found defective, and is not remedied as aforesaid, the seller hereby agrees to pay the cost of the

examination of the title and also to pay the Agent herein the commission hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied with.

(13) Within 30 days from the date of acceptance hereof by the seller, or as soon thereafter as a report on the title can be secured if promptly ordered, and/or survey, if required, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof.

If the purchaser shall fail to make full settlement, the deposit herein provided for may be forfeited at the option of the seller, in which event the purchaser shall be relieved from further liability hereunder, or, without forfeiting the deposit, the seller may avail himself of any legal or equitable rights and remedies which he may have under this contract.

(14) The entire deposit shall be held by Colonial Investment Company, Agent, until settlement hereunder is made or until the deposit is forfeited. In the event of the forfeiture of the deposit, the Agent shall retain one-half thereof as a compensation for his services and shall pay to the seller the remaining one-half of the forfeited deposit.

(15) If the property involved in this contract is located in a jurisdiction other than the District of Columbia, wherever any reference is made to the District of Columbia or any official thereof, the name of the jurisdiction in which property is located and the proper official thereof is substituted automatically. If the property is serviced by the Washington Suburban Sanitary Commission, annual benefit charges of said Commission are to be adjusted to date of transfer and assumed thereafter by purchaser.

(16) The seller agrees to pay to Colonial Investment Company, Agent, the regular rate of commission fixed by the Washington Real Estate Board, the amount of which said commission being hereby assigned to the Agent by the seller out of the proceeds of sale. The party through whom settlement hereunder is made is hereby authorized

and directed to make deduction of the aforesaid commission from the proceeds of the sale and to make payment thereof to said Agent.

(17) The principals to this contract mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns; that the provisions hereof shall survive the execution and delivery of the deed aforesaid and shall not be merged therein; that this contract contains the final and entire agreement between the parties hereto, and that they shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not herein contained. Executed in 4 copies.

House to be finished comparable to "B" type model home on Bolling Road and to include same equipment such as venetian blinds, electric stove and refrigerator, Bendix washing machine, lighting fixtures, etc. Sodding, landscaping as per sample house.

Purchaser shall pay all costs incident to the preparation of trusts, recording release fees, Federal & State Revenue Stamps, insurance taxes, survey, and other incidental costs to any mortgage hereinbefore placed and assumed by the purchaser. House to be painted white at cost of One Hundred and Twenty-five Dollars (\$125).

COLONIAL INVESTMENT COMPANY,
Agent

By /s/ Ernest W. Lewis

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

/s/ Victor R. Taylor
Purchaser

/s/ Dorothy E. Taylor
Purchaser

Wellington Park Estates, Inc.
Seller

By /s/ Nathaniel J. Taube, Pres.
Wife of Seller

Property is to be conveyed in the name of *Victor R. and Dorothy E. Taylor Tenants In The Entirety*

371 Filed May 24 1950 Harry M. Hull, Clerk

Pltfs. Exh. # 2

WELLINGTON PARK ESTATES, INC.

815-817 Ninth Street, N. W.

Washington 1, D. C.

January 5, 1949

Mr. Victor R. Taylor
390 Washington Avenue
Wellington Park Estates
Route #1
Alexandria, Virginia
Dear Mr. Taylor:

There has been presented to us for payment by the Odorless Septic Service three bills, each in the sum of \$35.00, dated December 19, December 24 and January 1, respectively. I was very much surprised, in our telephone conversation of a day or two ago, to learn that you were having this septic tank pumped weekly which was not in accordance with any understanding that you and I had.

We did authorize the payment for the pumping of your septic tank some several weeks ago due to an emergency, as we understood it, but we never knew that you were ordering this work done weekly. Since there may have been a misunderstanding between you and me, I am authorizing these bills paid; but this is to advise you that we will not pay any further bills incurred by you in connection with your septic tank.

We have placed the matter of the septic tanks in Wellington Park Estates in the hands of our attorney, Mr. Kendrick, of Jesse, Phillips, Klinge & Kendrick of Arlington, Virginia and we are awaiting his advice in connection

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with this situation. Until we hear from him, we regret that we cannot advise you further.

Very truly yours,
WELLINGTON PARK ESTATES, INC.

By /s/ Nathaniel J. Taube
Nathaniel J. Taube
President

372 Filed May 17 1950 Harry M. Hull, Clerk

Defts Exh # 1

Commonwealth of Virginia
FAIRFAX COUNTY HEALTH DEPARTMENT
Fairfax, Va.

Phone: Fairfax 128

March 11, 1947

Colonial Investment Company
815-17 Ninth St. N. W.
Washington 1, D. C.

Sirs:

In response to your communications and requests to this office regarding Federal Housing Administration request in connection with our approval of use of individual sewage disposal systems in Wellington Park sub-division, we wish to advise that private septic tank sewage disposal systems, if laid out in accordance with current requirements and installed under specifications of the Fairfax County Health Department, will be approved.

Yours very truly,
/s/ H. C. Bradford
H. C. Bradford, M. D.
Health Officer

HCB:vkc

No. 10,685

BRIEF FOR APPELLEES

MAY 8 1951

United States Court of Appeals
For the
District of Columbia Circuit

Joseph W. Stewart
United States Court of Appeals CLERK

FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLONIAL INVESTMENT COMPANY, ET AL.,
Appellants,

v.

VICTOR R. TAYLOR, ET AL.,
Appellees

Appeal from the United States District Court
for the District of Columbia

I. IRWIN BOLOTIN
M. TAFT WOODRUFF
1025 Connecticut Ave. N.W.
Washington, D. C.
Attorneys for Appellees

**APPELLEES' STATEMENT OF QUESTIONS
PRESENTED**

In the opinion of the appellees the questions presented are:

1. Whether, in the sale of a dwelling house under construction, where the builder-vendor makes representations to the prospective vendee that it will be completed in a workmanlike and first-class condition and the septic tank system servicing same would work properly and would require cleaning once every three to five years, the remedy of the vendee upon discovering that the septic tank system does not work properly and requires constant and frequent cleaning and cannot be made to work properly because of unsuitable soil conditions, is rescission of the contract.

2. Whether a vendee may rescind his contract when it is shown that the builder-vendor of a dwelling house knew, or should have known, prior to construction thereof that the septic tank system installed to service same could not function properly because of unsuitable soil conditions, and as a result thereof the habitability and enjoyment of said premises are materially affected.

3. Whether a vendee may rescind his contract where the builder-vendor falsely represented to vendee that no other dwellings in the area were having difficulties with their septic tank systems.

4. Whether a vendee is guilty of laches when he remains in possession of such dwelling during which time the vendor has recognized the vendee's rights and continues to give assurances to the vendee that the defective conditions will be remedied and steps are actually taken by the vendor in an effort to correct such defective conditions.

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IN THE
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No. 10,685

COLONIAL INVESTMENT COMPANY, ET AL.,
Appellants,

v.

VICTOR R. TAYLOR, ET AL.,
Appellees

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

APPELLEES' COUNTERSTATEMENT OF CASE

Appellants' statement of the case is substantially correct except for the corrections and additions which appear in this counterstatement. For convenience, the parties will be referred to as they appeared in the court below and as designated by appellants in their statement of the case:

Plaintiffs contacted defendants on March 5, 1948, in response to an advertisement in the newspaper (JA 113); the representations of the agent for defendants were made on that date and while the dwelling was still under construction (JA 113); the agent represented to plaintiffs that the septic tank system to service the dwelling would work properly and would have to be cleaned out once every three to five years (JA 22); the agent further represented to plaintiffs that no other dwellings in the area were having trouble with their septic tank systems (JA 115); this statement was false since it is without dispute that the defendants prior to that date had received complaints about improperly functioning septic tank systems from other persons who purchased dwellings from them in the same subdivision (JA 35, JA 108); defendants were advised prior to the time they began construction of the subdivision that the soil in the entire area was tight and not suitable for septic tank construction (JA 193); it is without dispute that these facts concerning the soil condition were also concealed and withheld from plaintiffs (JA 68); it was established by all expert witnesses that the reason for the improper functioning of the septic tank systems was the unsuitable soil condition of the entire area (JA 44, JA 51, JA 90, JA 99, JA 193). It is without dispute that the septic tank system servicing plaintiffs' dwelling has not functioned properly since the date they moved into the dwelling on March 27, 1948, and has required continuous pumping and cleaning from that date up to the time of trial. It was established by expert testimony that a properly functioning septic tank should be cleaned out on an average of once every five years (JA 58). Defendants introduced evidence concerning the rainfall for the year 1948, but the experts testified that heavy rainfall would not materially affect properly functioning septic tank systems (JA 60). Permits to builders to install septic tank systems were issued by the county

authorities as a routine matter (JA 162, JA 191); it was not the custom of the Health Department at that time to make or require percolation tests (JA 163). It is without dispute that sewage was spilling to the surface of the ground on the plaintiffs' property as well as in the entire area as the result of improperly functioning septic tank systems (JA 47, JA 82); it is also without dispute that this condition constitutes a menace to the entire community (JA 87) and has created an unsanitary condition which is a potential health hazard (JA 153, JA 156).

SUMMARY OF ARGUMENT

1. The findings of the trial court have ample support in the evidence and accordingly should not be disturbed.

2. A person who has been induced by false representations to purchase property may bring an action for rescission and obtain full relief in a Court of Equity.

3. Plaintiffs are not barred by laches if the wrongdoer has recognized plaintiffs' rights and if the delay is occasioned by the wrongdoers' continuing promises to correct the defective conditions.

4. Defendants did not raise any issues in their pleadings or at the pre-trial concerning the question of laches.

5. Sale of a dwelling house carries with it an implied warranty that it is fit for the purpose for which it is intended.

6. Failure of consideration in a material respect constitutes ground for rescission. Plaintiffs bargained for a dwelling with appropriate and proper sanitary and sewage disposal facilities, and not having received them, they failed to receive that for which they bargained.

7. It was proper to admit evidence of soil tests in order to show that soil was unsuitable for septic tank system functioning.

8. Compliance by a person with the formal requirements of the county authorities in obtaining a permit does not relieve such person from his active wrongdoing or negligence.

ARGUMENT

1. The Findings of the Trial Court Have Ample Support in the Evidence and Accordingly Should Not Be Disturbed.

No citation of authorities is necessary to establish the well recognized rule in this jurisdiction that findings of fact made by the trial court will not be set aside unless clearly erroneous.

References to the testimony in the Joint Appendix will show that the findings in the present case are amply supported by the evidence. These findings and the appropriate page references are stated below.

The court found as follows: That the agent had stated to plaintiffs that the septic tank system servicing the dwelling would work properly and would require cleaning only once every three to five years (JA 22); that no other dwellings in the area were having trouble with their septic tank systems (JA 115); that the plaintiffs had experienced trouble with their septic tank system from the time they moved into the premises on March 27, 1948, and up until the time of trial (JA 25); that the defendants were promptly notified of such conditions, and authorized, and paid for, the cleaning and pumping of the septic tank system on March 29, 1948, (JA 25); the defendants notified plaintiffs by letter dated January 5, 1949, that they would no longer continue their efforts

to correct the defective septic tank system and that this was the first notice to the plaintiffs that the defendants did not intend to correct the defective system (JA 65); owners of other dwellings constructed and sold by defendants in the immediate vicinity of the dwelling purchased by plaintiffs experienced similar difficulties with their septic tank systems prior to March 5, 1948, and that the defendants had been apprised of these problems and withheld this information from plaintiffs (JA 35, JA 108); that the septic tank system cannot be made to function properly because of unsuitable soil conditions and the factors concerning such soil conditions were known to defendants prior to March 5, 1948, and were unknown and concealed from plaintiffs (JA 193, JA 44, JA 90, JA 68); the conditions resulting from the septic tank system are unsanitary and potentially dangerous to the public health and materially affect the habitability and enjoyment of said premises (JA 87, JA 153, JA 156).

2. A Person Who Has Been Induced by False Representations to Purchase Property May Bring an Action for Rescission and Obtain Full Relief in a Court of Equity.

The gravamen of the present suit is that the contract was induced by representations that the dwelling which was then under construction would be serviced with a septic tank system which would work properly and would require cleaning only once every three to five years. In addition to this the defendants' agent represented to plaintiffs that no other dwellings constructed by defendants in the area were experiencing any difficulties with their septic tank systems. These statements of the defendants' agent were untrue. The septic tank system which was constructed to service the plaintiffs' dwelling has not functioned properly and has required constant and continuous pumping and cleaning from the date that the plaintiffs moved into the property up until the date

of trial. The uncontroverted tesitmony shows that this septic tank system cannot be made to function properly because of unsuitable soil conditions which exist in the entire area, and that this condition was known to defendants prior to the time they began construction of the subdivision. It is also uncontroverted that the representations of the agent that no other houses in the area were experiencing any difficulties was untrue, since owners of other dwellings purchased from the defendants had made complaints and the defendants had made efforts to correct such difficulties. We contend that these misrepresentations and concealments from the plaintiffs constitute a sufficient basis for a rescission of their contract. Defendants contend that the representations of the agent were expressions of an opinion and not statements of material facts and consequently are not actionable. We argue that these representations are not expressions of an opinion. The inquiry of the plaintiffs as to the septic tank system related to a matter inherently connected with the condition of the property and directly affected the matter of consideration. The representations made by defendants went directly to the basic enjoyment of the premises. Obviously, if the plaintiffs had known the true conditions they would not have purchased the dwelling. The statements made by defendants were for the purpose of inducing plaintiffs to purchase the property. Defendants further contend that the representations concerned the future and for that reason must be deemed matters of opinion. The representations of the agent constitute statements of fact although they are made of matter in the future. False statements concerning matters in the future, if affirmed as facts, amount to fraudulent misrepresentations and the injured party may bring an action of rescission if he has acted upon them.

It is the established law in this jurisdiction that one who has been induced on the basis of false representa-

tions to buy property may rescind his contract. *Turner v. Brewer, et al.*, 54 App. D. C. 363, 298 Fed. 685, *Seek v. Harris, et al.*, 76 U. S. App. D. C. 404, 132 F. (2d) 19, and *Passaic National Bank, et al., v. Commercial National Bank*, 49 App. D. C. 146, 262 Fed. 234.

In the case of *Hindman v. First National Bank of Louisville, et al.*, 112 Fed. 931, the court stated:

“* * * One who has been induced by false representations to buy property has open to him no less than three remedies. He may rescind and sue at law for the consideration, he may bring an equitable suit for rescission and obtain full relief, or he may retain what he has received and bring his action for fraud and deceit.”

This same doctrine has also been applied by our Municipal Court of Appeals. Thus in *Goldsten, et al., v. Burka*, 43 At. Rep. (2d) 712, the Court stated:

“* * * Here, the purchaser was assured he was buying a house with a certain type of sewage disposal equipment. He cannot be compelled to accept a house with a different type of equipment. Regardless of the relative merits of the two types, we think the trial court was authorized to take judicial notice that the two systems are materially different, and find that the misrepresentation was a material one, on which the purchaser relied and by which he was misled to his injury. Such findings were implied in the court's memorandum.”

In the case of *Smith v. O'Connor*, 66 App. D. C. 367, 88 F. (2d) 749, this court stated as follows:

“The representations made by the plaintiff were in the nature of inducements in procuring the lease agreement. They were specific representations. They pointed out specifically the defects and repairs that would be necessary to be made, and allowance for the repairs so specified was provided for in the agreement. Concealed from the knowledge of the defendant at the time the agreement was made were

the latent defects caused by the freezing, which had resulted in the bursting of the pipes and the radiators, and evidence as to this condition was admissible to prove the terms of the contract, nor is it any defense that plaintiff may not have been aware of the frozen condition of the pipes, since fraud may exist in a reckless or positive affirmation of a fact without knowledge of its truth."

It is universally recognized that statements of matter in the future, if affirmed as facts, may amount to fraudulent misrepresentations. Representations of this character are made as inducements to procure contracts. Thus in the case of *Freggens, et al. v. Clark*, 100 N. J. Eq. 389, 135 A. 681, the court stated:

"* * * The representation as to the cause of the condition of the cellar was a statement of an existing fact, and false, and, standing alone, is actionable; and the further representation that upon the removal of the cause the cellar would be dry was not promissory or an expression of an opinion, or a guarantee, but was so related to the cause of the existing condition of the cellar as to amount to an affirmation of a fact in the future. It was predicated upon a known falsehood and was inherently deceitful, and relief may be granted for such false affirmation. Pomeroy says, section 877 (4th ed.):

"That the *fact*, however, concerning which the statement is made in future does not, of itself, prevent the misrepresentation from being fraudulent. The statement of matter in the future, if affirmed *as a fact*, may amount to a fraudulent misrepresentation as well as a statement of a fact as existing at present."

"And in the notation of cases:

"Some of these cases may be referred to the doctrine of equitable estoppel; but it is plain that where the representation is that of a fact in the future, and not a mere promise, it is relied upon, and turns out to be false, the rights and remedies of the injured party are the same as those which arise from the fraudulent misrepresentation of an existing fact.'"

The case of *Mulheron v. Henry S. Koppin Co.*, 221 Mich. 187, 190 N. W. 674, was a suit by plaintiff against the defendant for cancellation of a land contract, for an accounting, and other relief. It appeared in that case that the defendant company was engaged in the business of building dwellings which it sold on contract. The defendant had erected a number of cottages upon a location which had previously been a brick yard and which subsequently became a dumping ground and was accordingly filled with all sorts of discarded articles. These articles were covered with soil and leveled off and left to stand for three years; then the defendant began its building operations. The plaintiffs claimed that the defendant had made certain representations as to the quality of the cottages and they would be of "good workmanship, that first class material was being used in their construction, and that the cottages were all first-class jobs." The plaintiffs purchased the dwelling after it was completed and moved in. They soon learned that the lot was filled ground and they began to have trouble with the dwelling. In that case, as in the present case, other houses in the subdivision were affected, and the purchasers got together and appointed a committee who attempted to negotiate with the defendants in respect to the defective dwellings. It also appeared in that case, as in this case, that the defendant undertook to correct the condition and continued to hold out a hope that the matter would be corrected. The court in that case stated as follows:

"* * * That there should be no misapprehension, it may be now stated that plaintiffs' basis of relief is not that the land was filled land, but that the foundation under the house was of such shallow depth that, taken in connection with the porous condition of the filled land, the house settled, causing the walls to crack, the floors to become uneven, the house to get out of plumb and render the job anything but a first-class job. It is doubtless true that other de-

fects in construction were discovered when the lawsuit was imminent which would have otherwise been overlooked.

"We are convinced that plaintiffs' house settled and the insufficiency of the foundation came to their knowledge in January, 1921.

• • • • •

"* * * We do not think the doctrine of *caveat emptor* applies. The defect which damaged the house was a latent one. The foundations were put in by a contractor employed by defendant. Doubtless defendant's officers and agents believed the contractor had complied with his contract and the building code of the city. But their representations to plaintiffs concerned a fact presumptively within their knowledge, of which they assumed to have knowledge; they were relied upon by plaintiffs to their damage, were untrue and were material. Under the repeated holdings of this court defendant cannot escape liability for them on the ground of good faith in making them."

In the case of *Bunch v. Bertram*, 219 Ky. 848, 294 S. W. 805, it appeared that the plaintiff purchased a house and lot from the defendant. Plaintiff filed suit against the defendant and claimed that the defendant had represented to him prior to his purchase that the basement was dry and would remain dry because it had been so constructed that it would not allow water to leak in. It was further alleged by the plaintiff that within a few weeks after he purchased the house he discovered that the basement had become filled with water when there was a heavy rain. The defendant denied that he had made these representations. In resolving the issues in favor of the plaintiff, the court stated as follows:

"* * * It is settled that, where a representation is made in positive terms as to a fact actually within the knowledge of the one making the representation, and when the representation itself contains nothing

so unreasonable as to create a doubt in the mind of the one to whom it is made, the hearer may rely upon it without an investigation when an investigation would be so difficult as to render it improbable that the hearer would ascertain the falsity of the representation by such an investigation. The tendency of modern decisions is to restrict, rather than to enlarge, the doctrine of caveat emptor. Therefore, if appellee said to appellant, as an inducement to cause appellant to purchase the property, that the basement was dry, and would continue so, the appellant was within his rights in relying upon such positive statement."

Another case illustrative of the principle under discussion in the present case is that of *Duncan v. Doyle*, 243 Mass. 177, 137 N. E. 293. That was an action for deceit in a sale of a house and land. The representation in that case concerned the fact that the cellar in the premises was a dry cellar. The court held that this was a representation of fact and not a mere expression of opinion. To the same effect is the case of *Mignault v. Goldman*, 234 Mass. 205, 125 N. E. 189, and the case of *Stowe, et al. v. Nieto, et al.*, 71 Cal. App. (2d) 375, 162 P. (2d) 837.

The case of *O'Shea v. Morris, et al.*, 112 Neb. 102, 198 N. W. 866, was an action brought by the plaintiff against the defendants for rescission of a contract to purchase a house. The controversy arose in respect to the location of a driveway and garage located partly upon the property purchased and partly upon an adjacent lot not owned by the vendors. The trial court found that the driveway was essential for the proper occupancy of the property owned by the plaintiff. The vendors knew that the garage and driveway were not located entirely upon their property and failed to advise purchaser of that fact. The plaintiffs believed from the character and location of the grounds and improvements that all of the garage and driveway were upon the property being purchased by them. The court stated as follows:

“* * * We are further of the opinion that the governing principle of law is well settled, and is to the effect that as between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts; and his failure to do so constitutes such fraud as would authorize rescission of the contract by the purchaser.”

In the present case it will be noted that we have not only the misrepresentations made by the defendants' agent, but we have in addition thereto the aggravated fraud of the concealment from plaintiffs that other properties constructed by the defendants in the vicinity and sold by them just prior to March 5, 1948, were having trouble with the septic tank systems installed by defendants. Obviously, if the plaintiffs had known of this they would not have purchased the present dwelling. There can be no doubt that the concealment of this material fact is equivalent to actual misrepresentation, particularly when such concealment is coupled with the fraudulent and misleading assertion that none of the other properties were having such difficulty. In the case of *Clauser v. Taylor*, 44 Calif. App. (2d) 453, 112 P. (2d) 661, it appeared that the vendor sold two filled lots to a purchaser without making any representations concerning the same. The purchaser later discovered that the lots had been filled, and he sought rescission. The defendant knew that the lots had been filled and that this fact was not apparent to the casual observer. The court said:

"This is the sole question presented for determination:

"When a vendor sells real property, which he knows has been filled and the value of which is materially affected by such filling, without disclosing to the vendee the fact that such property has been filled, and the vendee makes no inquiry relative to whether or not the property has been filled, may the vendee rescind the transaction upon learning the true facts?"

"This question must be answered in the affirmative. It is the law that, where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee, and upon his failure to do so, the vendee may rescind the transaction upon discovering the true state of facts. (cases cited.)

"Applying the foregoing rule to the facts of the instant case, it is apparent that defendant was aware of the fact that the property which she sold had been filled, which filling materially affected its value. Since this defect was not apparent to the observer, which fact was also known to defendant, she was under a duty to disclose the information to the vendee, and, upon her failure to do so, plaintiff was entitled, upon learning the true state of facts, to rescind the contract."

3. Plaintiffs Are Not Barred by Laches If the Wrongdoer Has Recognized Plaintiffs' Rights and If the Delay Is Occasioned by the Wrongdoers' Continuing Promises to Correct the Defective Conditions.

4. Defendants Did Not Raise Any Issues in Their Pleadings or at the Pretrial Concerning the Question of Laches.

It will be noted that the defense of laches was not raised in the answers filed by the defendants or at the pre-trial proceedings. No formal presentation of that defense was made at the trial and we accordingly urge

that it is too late for the defendants to raise such an issue at this time.

Defendants argue that one seeking rescission of a contract must act immediately upon discovery of the facts which authorize rescission. There are several exceptions to that general rule. The application of the doctrine of laches is controlled by equitable considerations and cannot be used to defeat justice. Admittedly in the present case the plaintiffs discovered a condition which indicated a defective septic tank system on the date they moved into the premises, but it is undisputed that the plaintiffs at once notified the defendants concerning such condition. The defendants immediately acknowledged this condition and took steps to correct it (JA 25). It is also without dispute that the defendants made several efforts to correct the improperly functioning septic tank system and continuously assured plaintiffs that they would and could cure the defective condition (JA 26, JA 27, JA 29). This acknowledgment by the defendants of the defective septic tank system on plaintiffs' property, together with the efforts on their part to correct such condition and the continued assurances given by defendants that the conditions would be corrected, are sufficient to estop the defendants from raising the defense of laches. Plaintiffs testified that it was not until they received the letter from the defendants dated January 5, 1949, advising them that they would no longer continue in their efforts to repair the defective condition, that they were for the first time apprised that the previous promises and assurances of relief would be repudiated. The present action was filed immediately thereafter. *It must be conceded that the delay in this case was induced by the defendants' own actions.* The conduct of the defendants in lulling the plaintiffs into a position of believing that the defective conditions would and could be corrected makes it unjust and inequitable for the defendants to now raise the defense of laches.

Defendants also argue that they have incurred a loss and cannot be restored to the status quo because of the delay. It will be noted, however, that there is absolutely nothing in the testimony to indicate that the defendants have sustained any loss or that the delay has worked a disadvantage to them.

5. Sale of a Dwelling House Carries With It an Implied Warranty That It Is Fit for the Purpose for Which It Is Intended.

6. Failure of Consideration in a Material Respect Constitutes Ground for Rescission. Plaintiffs Bargained for a Dwelling With Appropriate and Proper Sanitary and Sewage Disposal Facilities, and Not Having Received Them, They Failed to Receive That for Which They Bargained.

Defendants argue that the law will not imply a warranty in the sale of a house in the absence of an express stipulation to that effect. The defendants sold this dwelling for a specific purpose, namely human occupancy. The plaintiffs bargained for a dwelling with adequate and properly working sanitation and sewage disposal facilities. Not having received such a dwelling they have obviously not received that for which they bargained. It is elementary that a dwelling house intended for human habitation must have proper sanitation and sewage disposal facilities. Certainly it cannot be said that plaintiffs contracted to pay \$17,000. for a dwelling without properly functioning sanitation and sewage disposal facilities. This breach of contract, or failure of consideration, is of such a material element that the plaintiffs should not be compelled to accept a dwelling house with something less than that for which they are entitled.

In the case of *Minemount Realty Company, Inc. v. Ballentine*, 111 N. J. Eq. 398, 162 A. 594, it appears

that a vendor filed a bill in equity for specific performance against a vendee. The court in holding that the vendee was not obliged to accept the property stated as follows:

“Where a party contracts to build a building for a specified purpose, the law reads into the contract a stipulation that the building shall be erected in a reasonable good and workmanlike manner and when completed shall be reasonably fit for the intended purpose. * * *

As we have said, the question of false representations does not apply to the garage, which was not even begun, except for a little trench excavation perhaps, when the contract was signed; and the defendant, even if not deceived as to the house, was under no obligation to accept a property which in respect to the material element of the garage was not according to the contract.”

In the case of *Younger v. Caroselli*, 251 Mich. 533, 232 N. W. 378, the court stated as follows:

“A contract may be rescinded for failure of consideration through the vendor’s fault as well as on account of his fraud. * * * A failure of consideration on account of the vendor’s fault operates against the vendee the same as if he had been defrauded, and if there are grounds for equitable jurisdiction, the vendee should be entitled to a lien on the premises for the amount invested by him in the property.”

7. It Was Proper to Admit Evidence of Soil Tests in Order to Show That Soil Was Unsuitable for Septic Tank System Functioning.

We submit it was proper to permit testimony of soil tests made after the consummation of the sale. The purpose of this testimony was to show, first, that the soil was unsuitable for septic tank construction, and secondly, defendants’ knowledge of such facts. We have already shown that the defendants concealed these facts

from the plaintiffs. The defendants admit they made no tests to determine the suitability of the soil prior to the time they began construction. Whether the defendants are guilty of gross negligence in constructing dwellings with septic tank systems after they were informed of the unsuitable soil conditions or whether such conduct is active fraud is not important to the present issues. The plaintiffs are entitled under either theory to prevail in an action of rescission. Testimony concerning the soil went to the very basis and foundation of this entire proceeding. Obviously, if the septic tank system cannot be made to function properly because of unsuitable soil then there has been at least a failure of consideration in a material respect and the plaintiffs would be entitled to rescission.

8. Compliance by a Person With Formal Requirements of the County Authorities in Obtaining a Permit Does Not Relieve Such Person From His Active Wrongdoing or Negligence.

Defendants contend that they should be completely absolved of blame since the county health authorities granted permission to install the septic tank systems. This position of the defendants is completely untenable. In the first place the county health officer testified that the issuing of the permit by his office was merely a routine matter and that it was not customary at that time to make tests of the soil but this was something which was left entirely up to the builder. We also have the testimony of the building inspector who states that the issuance of a permit was merely a ministerial duty and no assurances are given to the builder that the soil was suitable for septic tank systems (JA 191). Under these conditions it is difficult to conceive how the builder-vendor can claim immunity because of the issuance of a permit.

CONCLUSION

The trial judge has given consideration to all of the testimony and has resolved the issues in favor of plaintiffs. To a great extent the testimony submitted by the plaintiffs is uncontroverted. The defendants offered no testimony whatsoever to dispute or contradict the charges of misrepresentation and concealment, or to refute the testimony that a septic tank could not function properly on the plaintiffs' premises because of the factors delineated in plaintiffs' case.

Accordingly, we submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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